

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



B  
P/S

**Docket No. 74-2516**

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**IN THE  
United States Court of Appeals  
For the Second Circuit**

—  
OLIN CONSTRUCTION COMPANY, INCORPORATED,

*Petitioner.*

—VS—

OCCUPATIONAL SAFETY AND HEALTH REVIEW  
COMMISSION and PETER J. BRENNAN, SEC-  
RETARY OF LABOR,

*Respondents.*

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**APPENDIX**

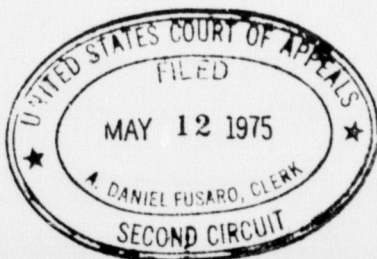
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DONALD J. BALL  
*Attorney for Petitioner*  
Office & P. O. Address  
436 South Salina Street  
Syracuse, New York 13202  
Telephone: (315) 422-2148

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## TABLE OF CONTENTS

	Page
Petition for Review to Court of Appeal .....	1
Order Adding Secretary of Labor as Party Respondent, dated 2-6-75 .....	5
Administrative Law Judge's Decision and Order, dated 8- 28-74 and Summary appearing at 2 OSHC 3184 .....	6
Petition to OSHARC for review of Decision and Order of Administrative Law Judge, dated 9-19-74 .....	28
Secretary's Citation, dated 8-16-73 .....	31
Secretary's Notification of Proposed Penalty, dated 8-16-73 .....	34
Employer's Notice of Contest, dated 8-28-73 .....	35
Secretary's Complaint .....	36
Employer's Answer .....	44
Excerpts of Minutes of Hearing, 1-23-74 .....	47
Excerpts of Minutes of Hearing, 1-24-74 .....	101
Exhibit C-4 — Photograph .....	157
Exhibit C-5 — Photograph .....	159
Exhibit C-6 — Photograph .....	161

### WITNESSES FOR THE DEPARTMENT:

Harold Pauly —	
Direct .....	51
Cross .....	74
Redirect .....	80
Recross .....	83
By Judge Oringer .....	84
Chester C. Whiteside —	
Direct .....	85
Cross .....	92
Redirect .....	96
By Judge Oringer .....	98

## WITNESSES FOR THE RESPONDENT:

## Richard Murphy —

Direct .....	103
Cross .....	107
Redirect .....	
Recross .....	
By Judge Oringer .....	

## Timothy Howard Duerr —

Direct .....	131
Cross .....	142
Redirect .....	154

## PETITION FOR REVIEW TO COURT OF APPEALS.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

OLIN CONSTRUCTION CO., INC.,

Petitioner,

vs.

PETITION  
FOR REVIEW

OCCUPATIONAL SAFETY and HEALTH  
REVIEW COMMISSION,

Respondent.

---

Olin Construction Co., Inc. hereby petitions the Court for review of the final Order of the respondent Commission issued September 28, 1974 in the matter entitled "Secretary of Labor, Complainant, vs. Olin Construction Co., Inc., Respondent, OSAHRC Docket No. 4459" pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (hereinafter called "the Act") and alleges:

1. Petitioner is and at all times hereinafter mentioned was, a New York corporation, with principal offices in Camillus, Onondaga County, New York.

2. On August 16, 1973, the U. S. Department of Labor, Occupational Safety and Health Administration pursuant to Section 9(a) of the Act and as a result of inspection made on August 9, 1973, issued citations for an alleged repeated serious violation of the Act as set forth in the standard at 29 CFR, Section 1926.652(b) with a proposed penalty of \$1,800.00 for said alleged serious violation and for an alleged

## Petition for Review to Court of Appeals.

repeated non-serious violation of the Act as set forth in the standard at 29 CFR, Section 1926.651(l)(1) with a proposed penalty of \$270.00 for said alleged non-serious violation.

3. On or about August 28, 1973, petitioner, pursuant to Section 10(c) of the Act, duly filed timely notice of contest to said alleged repeated serious violation and said alleged repeated non-serious violation.

4. Pursuant to the Act, the case was transferred to and received by the respondent Commission on or about September 10, 1973.

5. On or about September 26, 1973, the Secretary of Labor filed a complaint with the respondent Commission seeking affirmation of the citations and the proposed penalties which had been contested by petitioner.

6. On or about October 1, 1973, petitioner filed its answer to the complaint seeking dismissal of the alleged violations and the proposed penalties.

7. By order of the respondent Commission, the above cause was consolidated with the matter entitled "Secretary of Labor, Complainant, vs. Olin Construction Co., Inc., Respondent, OSAHRC Docket No. 4418" involving citations issued by the U. S. Department of Labor issued August 7, 1973 as a result of inspections made August 3, 1973.

8. On January 23, 1974 and January 24, 1974, a hearing upon the consolidated matter was held before Hon. David G. Oringer,

## Petition for Review to Court of Appeals.

Judge, OSHARC at Syracuse, New York.

9. By decision dated August 28, 1974, Judge Oringer vacated the alleged serious violation of that standard found at 29 CFR 1926.652(b) and the proposed penalty in the sum of \$600.00 as set forth in OSHARC Docket No. 4418.

10. By the decision dated August 28, 1974 concerning the alleged violations set forth in OSHARC Docket No. 4459, Judge Oringer determined petitioner to have been in violation of the standard at 29 CFR 1926.651(i) in a not-repeated non-serious manner and, as modified, affirmed such violation by respondent and reduced the penalty therefor from \$270.00 to \$250.00 (paragraphs 4 and 5 of Order); and further determined petitioner to have been in violation of the standard at 29 CFR 1926.652(b) in a serious, but not repeated, manner and as modified affirmed such violation, and reduced the penalty therefor from \$1,800.00 to \$800.00 (paragraphs 6 and 7 of Order); and determined that the sum of \$1,050.00 was due from petitioner to the U. S. Department of Labor for such violations (paragraph 8 of Order).

11. Petitioner seeks a review of the determination of the respondent Commission affirming, as modified, violations set forth in the case bearing OSHARC Docket No. 4459 as detailed in paragraph 10 herein, upon the grounds that such determination is not supported by substantial evidence on the record considered as a whole and is contrary to respondent Commission's own determination that alleged violations must

Petition for Review to Court of Appeals.

be established by a preponderance of the evidence.

WHEREFORE, petitioner prays that this Court review the within matter and issue an order setting aside and vacating the Order of the Occupational Safety and Health Review Commission determining that Olin Construction Co., Inc., is in violation of the standards at 29 CFR 1926.651(i) and 29 CFR 1926.652(b) and the aggregate penalty of \$1,050.00 due and owing thereon to the Secretary of Labor as set forth in paragraphs 4, 5, 6, 7 and 8 of said order.

DONALD J. BALL  
Attorney for Petitioner  
436 South Salina Street  
Syracuse, N. Y. 13202

74-2516  
B 39

5  
ORDER ADDING SECRETARY OF LABOR  
AS PARTY RESPONDENT, dated 2-6-75.

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the **Sixth** day of **February**, one thousand nine hundred and **seventy-five**.

**Olin Construction Company,  
Incorporated,**

**Petitioner,**

**v.**

**Occupational Safety and Health  
Review Commission,**

**Respondent.**

It is hereby ordered that the motion made herein by counsel for the

~~respondent~~

~~respondent~~

petitioner

~~respondent~~

by notice of motion dated **January 29, 1975** to add "**Peter J. Brummen, Secretary of Labor**" as a party respondent; for leave to file a **deferred appendix**; to extend the time to file a brief to and including **March 10, 1975**

be and it hereby is granted

~~denied~~

It is further ordered that

**WILLIAM H. TIMERS**

Circuit Judge

**ADMINISTRATIVE LAW JUDGE'S DECISION AND  
ORDER, dated 8-28-74 and Summary appearing at 2 OSHC  
3184.**

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR	:	
	:	
Complainant,	:	
	:	
v.	:	CONSOLIDATED
	:	
OLIN CONSTRUCTION CO., INC.	:	DOCKET NOS. 4418
	:	4419
Respondent.	:	
	:	

**APPEARANCES:**

For the Secretary of Labor

Francis V. LaRuffa, Regional Solicitor  
U. S. Department of Labor  
Theodore T. Gotsch, Esq., Attorney  
1515 Broadway, Room 3555  
New York, New York 10036

For Employer

Donald J. Ball, Esq.  
436 South Salina Street  
Syracuse, New York 13202

DECISION AND ORDER

DAVID G. ORINGER, JUDGE: This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., (hereinafter referred to as "the Act") to review a citation issued by the Secretary of Labor (hereinafter referred to as "complainant")

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

pursuant to section 9(a) and a proposed assessment of penalties thereon issued pursuant to section 10(a) of the Act.

The citations issued on or about August 7, 1973, allege that as a result of an inspection of the employer's work place on August 3, 1973, the employer, (hereinafter referred to as "respondent") at a work place under its ownership, operation, and/or control, violated occupational safety and health standards duly promulgated pursuant to section 6 of the Act, two in a non-serious manner and one in a serious manner. The respondent did not contest the non-serious violations and paid the proposed penalty in the sum of \$90 on or about August 30, 1973. It did contest the serious violation, and the penalty proposed therefor, in the sum of \$600.

Subsequent thereto, on August 16, 1973, the complainant issued against the respondent other citations alleging a repeated serious violation of the Act and a repeated non-serious violation of the Act at another work place under its ownership, operation, and/or control as a result of an inspection that took place on August 9, 1973. The complainant issued to the respondent on even date, to wit, August 16, 1973, a notification of proposed penalty proposing a penalty

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

of \$1800 for the repeated serious violation and proposing a penalty of \$270 for the repeated non-serious violation, the total penalties for both of the alleged repeated items, totaling \$2070.

On or about August 28, 1973, the respondent filed what appears to be a timely notice of contest contesting the repeated serious violation and the repeated non-serious violation, both issued on August 16, 1973, and the proposed penalty of \$2070 for both the repeated serious and repeated non-serious violations.

Complaint and answer issued in both cases, and thereafter a motion was made by the complainant to consolidate both cases, which motion was granted over objection by the respondent by Judge Herbert Bates, then sitting as a motions Judge.

The standards allegedly violated by the respondent in the citations issued on August 7, 1973, read as follows:

1. 29 C.F.R. 1926.201(a)(4)  
Flagmen shall be provided with and shall wear a red or orange warning garment while flagging. Warning garments worn at night shall be of reflectorized material.
2. 29 C.F.R. 1926.651(i)(1)  
In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

3. 29 C.F.R. 1926.652(b)  
Sides of trenches in unstable  
or soft material, 5 feet or  
more in depth, shall be shored,  
sheeted, braced, sloped, or  
otherwise supported by means  
of sufficient strength to pro-  
tect the employees working within  
them. See Tables P-1, P-2  
(following paragraph (g) of this  
section).

The serious violation as alleged by the complainant,  
is described as follows:

Standard Allegedly  
Violated

29 C.F.R. Section  
1926.652(b) as  
adopted by 29 C.F.R.  
Section 1910.12  
Page 27554

Description of Alleged Violation

Failure of the employer to  
support the sides of an exca-  
vation in unstable or soft  
material 5 feet or more in  
depth, by providing shoring,  
sheeting, bracing, sloping, or  
other support to protect employees  
who were working and exposed  
in the bottom of the excavation.

Insofar as the citations that were issued on or  
about August 16, 1973, the standards allegedly violated  
by the respondent read as follows:

Repeated Serious Violation

29 C.F.R. 1926.652(b)  
Sides of trenches in unstable  
or soft material, 5 feet or  
more in depth, shall be shored,  
sheeted, braced, sloped, or  
otherwise supported by means  
of sufficient strength to  
protect the employees working  
within them. See Tables P-1,  
P-2 (following paragraph (g)  
of this section).

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

Repeated Non-serious Violation

29 C.F.R. 1926.651(i)(1)

In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

The violations, as alleged by the complainant  
are described as follows:

Standard, regulation  
or section of the Act  
allegedly violated

29 CFR Section  
1926.652(b)  
As adopted by 29  
CFR Section 1910.  
12  
Page 27554

Description of Alleged Violation

Repeated serious violation  
Failure of the employer to support the sides of an excavation in unstable or soft material 5 feet or more in depth, by providing shoring, sheeting, bracing, sloping, or other support to protect employees who were working and exposed in the bottom of the excavation.

Repeated non-serious violation

29 CFR Section  
1926.651(i)(1)  
As adopted by  
29 CFR Section  
1910.12  
Page 27553

Failure of the employer to store excavated material at least 2 feet or more from the edge of the excavation.

Pursuant to notice, the trial of the consolidated cases was held on January 23 and January 24, 1974 in Syracuse, New York.

Having heard the testimony and observed the demeanor of the witnesses, and having considered the same, together with the citations, notifications of proposed penalties, notices of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that substantial evidence on the record, considered as a whole, supports the following

FINDINGS OF FACT

1. The respondent, Olin Construction Company, Inc., is a New York corporation with principal offices in Camillus, New York (tr. p. 6).

2. The respondent receives materials shipped in from outside the State of New York, makes and gets interstate phone calls and has mail coming in and going out of the State of New York (tr. pp. 6,7).

3. The respondent is one of the larger construction companies of its type in the geographical area wherein it works and had approximate sales for the fiscal year prior to the trial date of 5 million dollars (tr. pp. 6,7).

4. The respondent employs approximately 150 employees daily (tr. p. 7).

5. There were no injuries involved at the time and place of the alleged violations (tr. p. 7).

6. As a result of an inspection by an authorized representative of the Secretary on August 3, 1973, conducted in a work place wherein the respondent employed employees, the respondent was issued one citation for serious violation of that standard found at 29 C.F.R. 1926.652(b) and a citation alleging two non-serious violations of those standards found at 29 C.F.R. 1926.201(a)(4) and 29 C.F.R. 1926.651(i)(1), and, in addition thereto, received a notification of proposed penalty, proposing a penalty of \$600 for the serious violation and zero dollars for the alleged violation of 29 C.F.R. 1926.

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

201(a)(4), and a proposed penalty of \$90 for the alleged violation of 29 C.F.R. 1926.651(i)(1) (citation, notification of proposed penalty, complaint and answer in Docket No. 4418).

✓7. The respondent did not contest the alleged non-serious violation of that standard found at 29 C.F.R. 1926.201(a)(4) or the alleged non-serious violation of that standard found at 29 C.F.R. 1926.651(i)(1) and, in fact, paid the penalty proposed for the latter violation, which were both affirmed by operation of law, together with the penalties proposed for each. (See notice of contest, complaint and answer in Docket No. 4418).

✓8. The respondent filed a timely notice of contest to the serious violation alleged of that standard found at 29 C.F.R. 1926.652(b), which was issued on August 7, 1973 (notice of contest in Docket No. 4418).

9. As a result of a subsequent inspection by an authorized representative of the Secretary on August 9, 1973, conducted at a different work place wherein the respondent employed employees, the respondent was issued a citation for a repeated serious violation of that standard found at 29 C.F.R. 1926.652(b) and a repeated non-serious violation of that standard found at 29 C.F.R. 1926.651(i)(1), and, in addition thereto, received a

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

notification of proposed penalty, proposing a penalty of \$1800 for the alleged repeated serious violation and proposing a penalty of \$270 for the alleged non-serious violation, those penalties aggregating \$2070 in their entirety. (See citation, notification of proposed penalty, complaint and answer in Docket No. 4459).

10. The respondent filed a timely notice of contest contesting both citations issued on August 16, 1973, and the proposed penalties aggregating \$2070 for both of the alleged repeated violations. (See notice of contest in Docket No. 4459).

11. At the time of trial, the respondent did not contest the alleged violation of that standard found at 29 C.F.R. 1926.651(i)(1), but did contest the fact that it was a "repeated" violation. In addition thereto, it contested the penalty as being excessive (tr. pp. 9, 10).

12. The inspections of the respondent's work sites were made on the respective days of August 3, 1973 and August 9, 1973, and 15 days had not elapsed between the two inspections which were located in different work sites of the respondent. (See citations in Docket Nos. 4418 and 4459).

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

13. The respondent was in non-serious violation, not of a repeat nature, of that standard found at 29 C.F.R. 651(i)(1).

14. The penalty proposed for the repeated non-serious violation of that standard found at C.F.R. 1926.651(i)(1), in view of the finding above, is inappropriate.

15. The trench involved in the August 3, 1973 inspection was approximately 10 or 12 feet wide, 15 feet long and 6 to 8 feet deep and was of unstable soil (tr. pp. 20, 21, 38).

16. The complainant's representatives did not observe any employees in the trench that was inspected on August 3, 1973 (tr. pp. 39, 107, 108).

17. The sole and only evidence that the respondent had any employees exposed to the trench inspected on August 3, 1973, was hearsay testimony of an employee with the Secretary's representatives. This employee was not of a supervisory nature, was not questioned where in the trench he worked or what he did and was not subpoenaed in as a witness (tr. pp. 39, 108, 109, 135, and entire transcript).

18. On August 9 the complainant inspected an open and unshored trench which was the work site of the respondent. The trench was 8 or 9 feet deep, 12 to

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

15 feet long, elliptical-shaped and 9 to 10 feet wide, of unstable soil made up of sand, silt and loam, which had insufficient bracing, and was without shoring, sheeting, or sufficient sloping or other means of support (tr. pp. 43-50, 113).

19. On the 9th of August 1973, the respondent had employees working in the trench described in the finding above (tr. pp. 114, 117).

20. On August 9, 1973, the respondent suffered, allowed and permitted employees to work in a trench in unstable soil which was not properly braced, shored, sheeted or sloped (tr. pp. 48-53, 113-117).

21. The violation of 29 C.F.R. 1926.652(b) was a serious one in that there was danger of the sides of the trench caving in and covering the employee and suffocating him which would lead to serious injury or death and simple observation of the trench would expose the hazards therein so that it would be obvious to an employer (tr. pp. 54, 55).

22. The penalty proposed for the alleged repeated serious violation of that standard found at 29 C.F.R. 1926.652(b) is excessive inasmuch as it was "serious" but not "repeated". (Entire record).

23. On August 9, 1973 at the respondent's work site there were spoils piled at the edge of the trench less than 2 feet from the edge thereof without any retainer present (tr. 53, 9).

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

OPINION

Insofar as the inspection of August 3, 1973, is concerned, the sole evidence of exposure of respondent's employees to the trench in question on the day in question was an alleged conversation between the Area Director and an employee of the respondent, one, Loop, who allegedly advised the complainant's representative that he had been in the trench on that day. The Secretary's representatives failed to ascertain where in the trench the employee was situated and did not ask any of the respondent's foremen or authorized representatives whether or not the employee in question was in the trench. The conversation between the employee himself and the government's representative was, in my opinion, pure or as sometimes designated "rank" hearsay.

A finding of violation, in my opinion, may not be predicated upon pure hearsay and nothing else without some scintilla of real evidence upon which to predicate a finding. In the opinion of this tribunal, the complainant may have proven his case by several alternatives. One alternative was to subpoena the employee, who allegedly was in the trench on the day in question. Another method would have been for the Secretary's representatives to have questioned a foreman or some supervisory employees who have authority to speak for

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

the respondent insofar as supervision, safety and employment is concerned. Any foreman's testimony would not have been hearsay, in my opinion, but would have been the testimony of the respondent's employee bearing corporate responsibility at the work site. It is beyond conception that this laborer who allegedly was in the trench bore corporate responsibility at the work site and could speak for the respondent employer. Even if his testimony was not hearsay, there is no evidence when the employee was in that trench, where in the trench he had been working, what he had been doing in the trench, and whether in fact at the time that he may have been in the trench he was in a depth 5 foot or more. Accordingly, the allegation of serious violation of that standard found at 29 C.F.R. 1926.652(b) based on the inspection of August 3, 1973 must fall. Insofar as the non-serious violations alleged, they became Final Orders by operation of law. The non-serious violation most important to this cause is the uncontested violation of that standard found at 29 C.F.R. 1926.651(i)(1), alleging failure to keep spoils stored at least 2 feet from the edge of the trench or retained in some other manner. This allegation of violation became a Final

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

Order inasmuch as it was not contested.

Subsequent thereto, the respondent was inspected on August 9th, six days later, and thereafter cited for a repeated violation of the same standard. At the commencement of trial, the respondent withdrew its contest to the violation itself, but not to the allegation of "repeated," nor to the penalty proposed therefor.

Inasmuch as the Act does not define the word "repeat" or "repeated," one goes to the dictionary to ascertain the ordinary meaning of the word, and the closest definition appears to be "to do, make, perform, etc., again; to do or say something again." In the instant cause we must ascertain whether the same standard was violated "again."

To expect the Secretary or the complainant to do more than prove that the identical standard was violated previously and became a Final Order of the Commission would be to impose an intolerable burden upon him in the way of proof. The salient question before this tribunal is whether a citation for a repeated violation may be issued within 15 days of a citation for the identical violation. In Secretary v. Kesler & Sons Construction Company, Docket No. 306, involving a "notification of additional penalty for failure to abate,"

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

Chairman Moran, speaking for the Commission majority,  
stated as follows:

"Before the termination of the  
15 working-day period (at which  
time, if uncontested, a citation  
becomes a Final Order of the  
Commission: 29 U.S.C. 659(a))  
that citation is no more than an  
accusation. The 'violations'  
therein are only allegations of  
non-compliance, and Congress  
clearly intended them as such."

In my opinion, this concept also applies to allegations  
of "repeated" violations.

It appears that a repeated violation may only be  
charged after a Final Order is found against a given  
respondent. Until a Final Order issues against a  
respondent, a citation for repeated violation may not  
be found. In the instant cause, the respondent had  
15 days in which to file a notice of contest for the  
allegation of non-serious violation of that standard  
found at 29 C.F.R. 1926.651(i) and until 15 days had  
elapsed, following the logic expressed in Secretary v.  
Kesler, supra, a charge of "repeated" violation of that  
could not be made, thus the allegation of repeated violation  
must fall. Despite the fact that the violation is not  
here found to be a "repeated" violation, spoils existing

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

at the edge of the trench in unstable soil, in my opinion, creates exacerbation of the serious hazard and is a definite hazard in and of itself and, in my opinion, warrants a penalty, in this case, of \$250, and therefore the penalty is appropriately so reduced.

Inasmuch as this tribunal has found that the Secretary failed to sustain the burden of proof of violation on August 3, 1973, of that standard found at 29 C.F.R. 1926.652(b) because of a lack of employee exposure, the allegation of a repeated violation of that standard found at 29 C.F.R. 1926.652(b) must be reduced to a serious violation of that standard. In my opinion, the allegation of "repeated" must fall for two reasons, one reason being that the citation for repeated violation was given out within the 15-day grace period and prior to a Final Order existing against the respondent, and secondly, inasmuch as the first allegation of violation is found not proven, the second violation cannot be a "repeated" one, as the respondent has not violated the same standard again.

It is the opinion of this tribunal that the trench inspected on August 9 was deeper than 5 feet, was located in unstable soil, had insufficient sloping and bracing, was not sheeted or shored, was in unstable soil and was a dangerous trench in which to be working. The argument of

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

respondent that the entry of the complainant's representatives into the trench for the purposes of inspection and measurement proved that it was a safe trench, in my opinion, is totally without merit. The fact that the Secretary's representatives in this case, resorted to the height of folly in entering a place of hazard and danger, does not make the trench any less dangerous; rather, it makes their conduct quite hazardous. The proof of exposure to this violation was of a different quantum of proof than the proof adduced concerning the trench inspected on August 3. In this instance, the complainant's representatives learned who was exposed in the trench from representatives of the respondent who had the right to speak for the respondent and who bore corporate responsibility at the work site. This was not hearsay; this was testimony of the respondent to the complainant. Insofar as credibility is concerned, I give full credibility to the testimony of complainant's witnesses insofar as their conversations with the respondent's employees on the day in question so far as exposure in the trench on August 9 is concerned.

The penalty, however, insofar as this is not a "repeat" violation is excessive. In my opinion, a proper penalty for this violation, giving due consideration to all of the elements mandated in section 17(j) of the Act,

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

is \$800. Accordingly, it is the finding of this tribunal that the penalties to be paid by the respondent to the complainant, in the aggregate in this case, over and above the \$90 already paid for that violation found to be a Final Order, is \$1,050.

Based on all of the foregoing considerations, the Judge makes the following

CONCLUSIONS OF LAW

1. At all time herein mentioned, this respondent was engaged in a business affecting commerce, within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.
2. The respondent was, on the dates of the inspections at its work places herein concerned, and at all of the times mentioned herein, an employer subject to the safety and health regulations promulgated by the Secretary of Labor and referred to in the citation and complaint herein.
3. The respondent on August 3, 1973, was not proven in violation of that standard found at 29 C.F.R. 1926.652(b).
4. The respondent on August 9, 1973, was in violation of that standard found at 29 C.F.R. 1926.651(i)(1), which constituted a non-serious violation.

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

5. The respondent on the 9th day of August 1973 was in serious violation of that standard found at 29 C.F.R. 1926.652(b).

6. The penalty proposed for the alleged serious violation of 29 C.F.R. 1926.652(b) on August 3, 1973, not found proven, was inappropriate and must be VACATED.

7. The penalty proposed for the non-serious violation of that standard found at 29 C.F.R. 1926.651(i)(1), found proven herein, in the sum of \$270, was computed on the theory that the violation was "repeated", which was not found herein, and the penalty is herewith MODIFIED to the sum of \$250.

8. The penalty assessed for the non-serious violation of that standard found at 29 C.F.R. 1926.651(i)(1) was reached by considering all the elements of 17(j), and particularly the gravity thereof, and the fact that the respondent admits having two such violations within a week. Further, this violation was of such a gravity that the Secretary may well have charged the violation to be a "serious" one.

9. The penalty proposed for the alleged repeated violation of that standard found at 29 C.F.R. 1926.652(b) was inappropriate inasmuch as the violation was found to

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

be a serious one but not a repeated one, and the penalty proposed in the sum of \$1800 is herewith VACATED, and a penalty of \$800 assessed, for the serious violation of that standard found proven herein.

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

1) The non-serious violation of that standard found at 29 C.F.R. 1926.201(a)(4) alleged as a result of the inspection of August 3, 1973, not contested by the respondent, and the penalty proposed therefor in the sum of zero dollars, became Final Orders of the Commission pursuant to section 10(a) of the Act.

2) The alleged non-serious violation of that standard found at 29 C.F.R. 1926.651(i) as a result of the inspection of August 3, 1973, and the proposed penalty therefor in the sum of \$90, neither having been contested by the respondent, became Final Orders of the Commission pursuant to section 10(a) of the Act, and the respondent having paid the \$90 proposed penalty, that sum is no longer due and owing the complainant.

3) The serious violation alleged by the complainant as a result of the inspection of August 3, 1973, to wit, that of 29 C.F.R. 1926.652(b), and the penalty proposed therefor in the sum of \$600, be and the same, are herewith VACATED.

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

4) The violation alleged of that standard found at 29 C.F.R. 1926.651(i) in a "repeated" non-serious manner is herewith MODIFIED to a non-serious manner, and as so MODIFIED is herewith AFFIRMED.

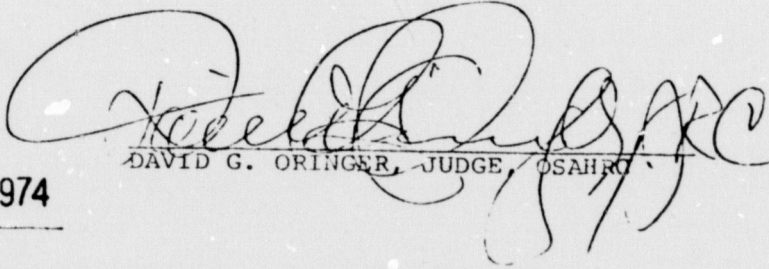
5) The penalty proposed for the aforesaid violation of that standard found proven at 29 C.F.R. 1926.651(i) (1), in the sum of \$270, is herewith MODIFIED to the sum of \$250, and as so MODIFIED is herewith AFFIRMED.

6) The violation alleged of that standard found at 29 C.F.R. 1926.652(b) in a repeated serious manner is herewith MODIFIED to a "serious" violation of the said standard and as MODIFIED is herewith AFFIRMED.

7) The penalty proposed for the aforesaid violation of that standard found at 29 C.F.R. 1926.652(b), herein found proven as a serious violation but not as a repeated one, in the sum of \$1800, is herewith MODIFIED to the sum of \$800, and as so MODIFIED is AFFIRMED.

8) The total penalties ASSESSED, other than the sum of \$90 already paid, amount in the aggregate to \$1050 and is due and owing to the complainant by the respondent.

SO ORDERED.

  
DAVID G. ORINGER, JUDGE, OSAHRO

Dated: AUG 28 1974

Administrative Law Judge's Decision and Order, dated 8-28-74 and Summary appearing at 2 OSHC 3184.

**OLIN CONSTRUCTION COMPANY, INC.**

**Review Commission Final Order**

SECRETARY OF LABOR, Complainant v. OLIN CONSTRUCTION COMPANY, INC., Respondent, OSAHRC Docket Nos. 4418 and 4459, September 27, 1974.

Theodore T. Gotsch, New York, N.Y., for complainant.

Donald J. Ball, Syracuse, N.Y., for respondent.

Review Commission Judge David G. Oringer.

**BURDEN OF PROOF**

**Hearsay Evidence—Alleged Conversation with Worker ▶ 110.03**

Alleged conversation between Area Director and employee, who purportedly advised Area Director that he had been working in unshored trench, constitutes hearsay evidence of employee exposure and is insufficient to establish serious violation of 29 CFR 1926.652(b).

**REPEATED VIOLATION**

**Issuance of Citation—15-Day Period ▶ 115.05 ▶ 40.071**

Citation for repeated violation may not be issued within 15 days of citation for identical violation.

**Issuance of citation—Failure of Proof.**

Issuance of citation for repeated violation within 15-day grace period, together with Secretary's failure to prove initial allegation, requires vacation of citation.

[Digest] The employer was cited for a serious violation of 29 CFR 1926.652(b) for failure to support sides of an excavation dug in unstable soil; for a nonserious violation of 29 CFR 1926.201(a)(4) for failure to provide flagmen with reflectorized warning garments; and for a nonserious violation of 29 CFR 1926.651(i)(1) for failure to store material more than two feet from the edge of an excavation. A \$600 penalty was proposed for the serious violation and a \$90 penalty was proposed for the nonserious storing violation.

Neither nonserious violation was contested and the employer paid the \$90 penalty. The employer did, however, contest the serious violation.

A subsequent inspection was conducted at a different worksite wherein the employer was cited for a repeated serious violation of 29 CFR 1926.652(b) and a repeated nonserious violation of 29 CFR 1926.651(i)(1). Penalties of \$1800 and \$270, respectively, were proposed for these violations. The employer did not contest the alleged violation of 29 CFR 1926.651(i)(1), but did contest the fact that it was a repeated violation. It also contested the appropriateness of the penalty.

The inspections of the worksites were made on August 3, 1973 and August 9, 1973. Fifteen days had not elapsed between the two inspections.

The only evidence to show employee exposure as to the serious violation was hearsay testimony. The employee, who allegedly told the Area Director that he was in the unshored trench, was not a supervisor and was not questioned wherein the trench he worked or what he did. The Secretary also failed to subpoena this employee as a witness. Accordingly, the allegation of the serious violation found at 29 CFR 1926.652(b) was vacated.

However, the violation of that standard resulting from the second inspection was proven. There was danger of the sides of the trench collapsing on the employee, resulting in suffocation and death. Simple observation of the trench would have exposed the hazards.

Because the first alleged violation of the standard, 29 CFR 1926.652(b), was not proven, the second violation was not a repeated one.

The nonserious violations alleged in the first citation became final orders by operation of law because they were uncontested.

When the second inspection occurred, a repeated violation of 29 CFR 1926.651(i)(1) was charged for the employer's failure to effectively store

Administrative Law Judge's Decision and Order, dated  
8-28-74 and Summary appearing at 2 OSHC 3184.

material at the excavation's edge. It has been held in *Kessler & Sons Construction Company*, 2 OSHC 1096 (1974), that a citation, if uncontested, is only an allegation of noncompliance until the termination of the 15 working-day period, at which time the citation becomes a final order. Following this logic, the employer in this case had 15 days in which to file a notice of contest for alleged nonserious violation of 29 CFR 1926.651(i)(1). Until the elapse of that 15-day period, a charge of repeated violation could not be made. Thus, the allegation of *repeated* violation was vacated.

Despite the fact that the violation of 29 CFR 1926.651(i)(1) was not a repeated one, spoils existing on the trench's edge were definite serious hazards. Because of the above factors, the proposed penalty was reduced from \$270 to \$250.

Moreover, the penalty proposed for the alleged repeated serious violation was inappropriate inasmuch as the violation was found to be a serious one, and was not repeated. The \$1800 penalty proposed was vacated and a penalty of \$800 was assessed for the serious violation of the standard at 29 CFR 1926.652(b).

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PETITION TO OSHARC FOR REVIEW OF DECISION  
AND ORDER OF ADMINISTRATIVE LAW JUDGE,  
dated 9-19-74.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant,

v.

OLIN CONSTRUCTION CO., INC.,

Respondent.

PETITION  
FOR REVIEW

DOCKET NOS. 4418  
4459

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APPEARANCES:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa  
Regional Solicitor  
Theodore T. Gotsch, Esq.  
U. S. Department of Labor  
1515 Broadway, Room 3555  
New York, New York 10036

FOR THE RESPONDENT

Donald J. Ball, Esq.  
436 South Salina Street  
Syracuse, New York 13202

Petition to OSHARC for Review of Decision and  
Order of Administrative Law Judge, dated 9-19-74.

Respondent Olin, being aggrieved by the decision of Judge David G. Oringer, OSAHRC, dated August 23, 1974, respecting the alleged violation occurring on August 9, 1973, does hereby petition the Commission for a review of said decision pursuant to Rule 91 of the Rules of Procedure of the Commission.

Respondent takes exception to the following findings of fact contained in the decision: findings 18, 19, 20 and 21, for the reason that said findings were not only not supported, but in fact, are contrary to the evidence contained in the record.

Complainant's witness Pauly did not observe any employees in the trench (51, 92). Complainant's witness Whiteside did not observe any employees in the trench but did observe one coming out of the trench at the edge where the ladder was located (114).

While Complainant's witness Pauly did not see any employees in the trench, he stated that respondent's foreman Duerr told him that men were working in the trench where shovels were shown in Exhibit C5. This testimony is expressly contradicted by Duerr who stated that respondent employees were not in the unshored portion of the trench (262). In fact, the employees were engaged in installing shoring at the time of the arrival of the OSHA Compliance Officers (263, 269, 274, 275, 276).

Respondent takes exception to that portion of the opinion set forth on page 16 in which the Court states that it gave "full credibility to the testimony of the complainant's witnesses insofar as their conversations with the respondent's employees" on August 9, 1973.

The Trial Judge overlooked the determination of the Commission that the Secretary must establish its case by a preponderance of the evidence (Secretary of Labor v. Armor Elevator Co., Inc., OSAHRC Dkt. Nos. 425, 426 1 OSHC 1409). Respondent submits that there must be a more substantial showing of proof on the part of the Secretary than that contained in the present record to support the Trial Judge's opinion upon this particular point.

Respondent further submits that the record clearly shows that the trench in question complied with the Standard at 29 CFR 1926.652(c). Respondent's employees had characterized the trench as being safe and the complainant's evidence (Exhibit C5 and C6) sustain this position because of the entry and exposure of Enforcement Officer Pauly into the trench itself.

Petition to OSHARC for Review of Decision and  
Order of Administrative Law Judge, dated 9-19-74.

Respondent further takes exception to the Conclusion of  
Law No. 5 and Conclusion of Law No. 9 being the penalty assessed  
for the alleged violation and to paragraph 7 of the Order of Trial Judge.

Respondent further takes exception to paragraph 7 of the  
Conclusion of Law and paragraph 5 of the Order assessing the amount  
of \$250.00 for the non-serious violation of the Standard at 29 CFR  
1926.651(i)(1).

WHEREFORE, respondent requests that the decision of the  
Trial Judge herein be reviewed by this Commission.

Respectfully submitted,

Dated: September 19, 1974.

Donald J. Ball  
Attorney for Respondent

## SECRETARY'S CITATION, dated 8-16-73.

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration200 Midtown Plaza  
700 E. Water St.  
Syracuse, N.Y. 13210

CSHO NO.	OSHA 1 NO.	FY
P-1568	7	74
AREA	REGION	
6010	2	

TO: Mr. George Olin  
President  
Olin Construction Company Inc.  
Box 55  
Camillus, New York 13031

Subject: Citation(s) for Alleged Occupational Safety and Health Violation(s)

An inspection of a place of employment has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, (29 U.S.C. 651 *et seq.*). The nature of such alleged violation(s) is described in the enclosed citation(s) with references to applicable standards, rules, regulations and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each alleged violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 3 working days\*, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act. The Act provides for penalties for violation of the posting requirements.

You are hereby notified, or will soon be notified, whether or not penalty(ies) will be proposed as a result of the cited violation(s). You have the right to contest any or all parts of either the citation(s) or the proposed penalty(ies) before the Occupational Safety and Health Review Commission. The Review Commission is an independent agency with authority to issue decisions regarding citation(s) and proposed penalty(ies). If you do contest, you should submit a letter to the Area Director at the address shown above within 15 working days\* after receipt of the certified mail notice regarding proposed penalty(ies). If you fail to contest within the 15 working day period, the citation(s) and the penalty(ies) as proposed, shall be deemed to be a final order of the Review Commission and not subject to review by any court or agency.

If an employer contests the citation, the abatement period specified therein does not begin to run until the date of the Commission's final order in the case *PROVIDED* the employer initiated his contest in good faith and not solely for delay or avoidance of penalties.

You have a right to request a discussion with the Area Director concerning any results of the inspection (abatement dates, citations, penalties, etc.). Please direct correspondence to, or call, the Area Director at the address shown at the top of this letter. A request for an informal discussion cannot extend the 15 working day period allowed for filing a notice of contest. Therefore, a request for an informal discussion should be brought to the attention of the Area Director prior to the end of the 15 working days allowed for filing a notice of contest, preferably as soon as possible.

An employee or representative of employees may file a notice (letter) to contest the reasonableness of the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. A followup inspection may be made for the purpose of ascertaining that the employer has posted the citation(s) as required by the Act and corrected the alleged violations. Failure to correct an alleged violation within the abatement period may result in further proposed penalties for each day the alleged violation has not been corrected. Timely correction of an alleged violation does not affect the initial proposed penalty.

Correction of alleged violations which have an abatement period of 30 days or less should be reported in writing to the Area Director promptly upon correction. Reports of corrections should show specific corrective action on each such alleged violation and the date of such action. On alleged violations having an abatement date of more than 30 days, a written progress report should be submitted each 30 days. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director should be so advised.

The Act provides that whoever knowingly gives false information is subject to a fine up to \$10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address shown above.

\*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

Citation(s) Enclosed		Pages
Quantity		
_____	Nonserious	_____
_____	Serious	_____
_____	Willful	_____
2	and/or	2
_____	Repeated	_____

4. Notification of Proposed Penalty enclosed  
☒ Yes    ☐ No

U.S. Department of Labor  
by Area Director

5

Date August 16 19 73

Secretary's Citation, dated 8-16-73.

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration

## CITATION

203 Midtown Plaza  
700 E. Water St.  
Syracuse, N.Y. 13210

CSHO NO.	OSHA-1 NO.	FY
P-1568	7	74
AREA	REGION	
6010	2	

TO: 2. Mr. George Olin  
President  
Olin Construction Company Inc.  
Box 55  
Camillus, New York 13031

3. Citation Number 14. Page 1 of 5. 1

## 6. TYPE OF ALLEGED VIOLATION(S): REPEATED SERIOUS

7. An inspection was made on August 9 19 73 of a place of employment located at: 7087 Lake Shore Road, Sullivan Home Sewer Lateral  
8. and described as follows:  
9. An Excavation 8-9 Feet Deep, 12-15 Feet Long, 9-10 Feet Wide

On the basis of the inspection, I allege that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	Description of alleged violation	13. Date by which alleged violation must be corrected
1.	29 CFR Section 1926.652(b) As adopted by 29 CFR Section 1910.12 Page 27554	Failure of the employer to support the sides of an excavation in unstable or soft material 5 feet or more in depth, by providing shoring, sheeting, bracing, sloping, or other support to protect employees who were working and exposed in the bottom of the excavation.	Immediately Upon Receipt Of This Citation

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days\*, whichever period is longer.

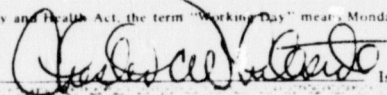
## RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days\* of the issuance of this citation.

\*No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1)

\*Under the Occupational Safety and Health Act, the term "working day" means Mondays through Fridays but does not include Saturdays, Sundays or Federal Holidays.

14. Area Director's Signature


Issuance Date August 16 19 73

(NOTICE: Additional Important Information On Reverse Side)

Form OSHA-2

Secretary's Citation, dated 8-16-73.

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration

CSHO NO.	OSHA-1 NO.	FY
P-1558	7	74
AREA	REGION	
6010	2	

## CITATION

203 Midtown Plaza  
700 E. Water St.  
Syracuse, N.Y. 13210

TO: 2. Mr. George Olin  
President  
Olin Construction Company Inc.  
Box 55  
Camillus, New York 13031

3. Citation Number 24. Page 1 of 5. 1

## 6. TYPE OF ALLEGED VIOLATION(S): REPEATED NONSERIOUS

7. An inspection was made on August 9 1973 of a place of employment located at: 7087 Lake  
8. Shore Road, Sullivan Home Sewer Lateral and described as follows:  
9. An Excavation 8-9 Feet Deep, 12-15 Feet Long, 9-10 Feet Wide

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1.	29 CFR Section 1926.651(1)(1) As adopted by 29 CFR Section 1910.12 Page 27553	Failure of the employer to store excavated material at least 2 feet or more from the edge of the excavation.	Immediately Upon Receipt Of This Citation

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days\*, whichever period is longer.

## RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days\* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 650(c)(1).

\*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays or Federal Holidays.

14. Area Director's Signature [Signature] Issuance Date August 16 19 73

(NOTICE: Additional Important Information On Reverse Side)

Form OSHA-2

5

203 Midtown Plaza  
700 E. Water St.  
Syracuse, N.Y. 13210

CSHO NO.	OSHA-1 NO.	FY
P-1568	7	74
AREA	REGION	
6010	2	

TO: Mr. George Olin  
President  
Olin Construction Company Inc.  
Box 55  
Camillus, New York 13031

3. Date August 16, 1973

THERE IS NO REQUIREMENT THAT  
THIS NOTIFICATION BE POSTED.

This notification and the penalty (ies) proposed by the Secretary of Labor shall be deemed to be the final order of the Occupational Safety and Health Review Commission *(an independent agency with authority to issue decisions respecting citations and proposed penalties)* and not subject to review by any court or agency unless, within 15 working days from the date of receipt of this notification, you submit a letter of contest. The letter of contest should be mailed or otherwise delivered to the Area Director named below at the address shown at the top of this notification. If no notice of contest is filed within the 15 working day period the proposed penalty (ies) becomes final and is immediately payable.

Payment of all penalties shown is to be made by check or money order payable to the order of "Occupational Safety and Health-Labor".  
Payment of penalties should be remitted to the Area Director at the address shown above.

Section 17(1) of the Act states: "Civil penalties owed under this Act shall be paid into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."

On the 16th day of August, 1973, a citation(s) was issued to you in accordance with the provisions of Section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that citation(s). =

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of Section 10(a) of the Act, the penalty(ies) set forth below is/ are being proposed, based on the citation(s).

5. REPEATED SERIOUS VIOLATIONS

5A. <u>Citation No.</u>	5B. <u>Item No.</u>	5C. <u>Proposed Penalty</u>
1	1.	\$1800.00

6. REPEATED NONSERIOUS VIOLATIONS

6A. <u>Citation No.</u>	6B. <u>Item No.</u>	6C. <u>Proposed Penalty</u>
2	1.	\$270.00

7. Total Proposed Penalty for All Alleged Violations \$ 2070.00

Area Due to Date  
S. *[Signature]* August 16 73

The proposed penalty for Nonserious Violations of safety and health standards reflects a 50 percent adjustment factor for corrective action to be taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, the 50 percent adjustment will be added to such other penalty as may subsequently be proposed for failure to correct a violation within the abatement period. No abatement credit is allowed for violations of recordkeeping or posting requirements.

EMPLOYER'S NOTICE OF CONTEST,  
dated 8-28-73.

August 23, 1973

U. S. Department of Labor  
Occupational Safety & Health Administration  
203 Midtown Plaza  
Syracuse, New York 13210

Attention: Mr. Chester Whiteside,  
Area Director

Re: Olin Construction Co., Inc. (Employer)  
P. O. Box 55, Camillus, New York 13031

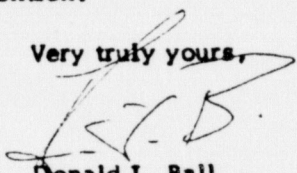
Gentlemen:

I am attorney for and representative of the above-named employer.

Please be advised that the employer intends to contest the repeated serious violation set forth on Citation No. 1 dated August 16, 1973, and the repeated non-serious violation as set forth on Citation No. 2 issued August 16, 1973, and the proposed penalty of \$2,070.00 for both the repeated serious and the repeated non-serious violation, copies attached.

I assume that all future pleadings and all future communications concerning this matter will be directed to me for proper attention.

Very truly yours,

  
Donald J. Ball

DJB/ar  
Encl.  
cc: Olin Construction Co., Inc.

Certified Mail  
Return Receipt Requested

## SECRETARY'S COMPLAINT.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,

OSHEC DOCKET

v.

NO. 4459

CASE CONSTRUCTION CO., INC.,

Respondent,

UNITED STEELWORKERS OF AMERICA, LOCAL  
NO. 15480,

Authorized  
Employee  
Representative.

COMPLAINT

WILLIAM J. KILBERG  
Solicitor of Labor

FRANCIS V. LA RUFFA  
Regional Solicitor

THEODORE T. GOTSCH  
Attorney

U. S. DEPARTMENT OF LABOR  
Attorneys for PETER J. BRENNAN,  
SECRETARY OF LABOR.

## POST OFFICE ADDRESS:

Francis V. LaRuffa  
Regional Solicitor  
U. S. Dept. of Labor  
1515 Broadway - Room 2152  
New York, New York 10016  
Tel. 312-971-7474

ONLY COPY AVAILABLE

## Secretary's Complaint.

UNITED STATES OF AMERICA

## OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	:	OSHRC DOCKET
v.	:	NO. 4459
CLIN CONSTRUCTION CO., INC.,	:	
Respondent,	:	
UNITED STEELWORKERS OF AMERICA, LOCAL NO. 15480,	:	
Authorized Employee Representative.	:	

COMPLAINT

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of the Occupational Safety and Health Act of 1970 (34 Stat. 1590, 29 U.S.C. 651, et seq.), hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Part 1926) have been violated. It is, therefore, averred and charged that

I

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

II

The respondent, CLIN CONSTRUCTION COMPANY, INC., a corporation organized under the laws of the State of New York and doing business in the State of New York, maintaining an office and place of business at Gordon Road, Camillus, New York, is and at all times hereinafter mentioned was engaged in construction.

III

Since on or about January 1, 1972, many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act.

IV

As a result of an inspection by an authorized representative of the plaintiff, respondent corporation was issued two citations for violations on August 16, 1973 pursuant to section 9(a) of the Act.

## Secretary's Complaint.

## V

On August 9, 1973 at a worksite located at 7087 Lake Shore Road, Brewertown, New York, at the Sullivan Home Sewer Lateral, the respondent violated section 5(a)(2) of the Act and the following standards duly promulgated pursuant to section 6 of the Act:

1) 29 C.F.R. 1926.651(1)(1) in that the respondent failed to store excavated material at least two feet or more from the edge of an excavation which employees may be required to enter.

2) 29 C.F.R. 1926.652(b) in that respondent failed to support the sides of an excavation in unstable or soft material five feet or more in depth, by providing shoring, sheeting, bracing or by sloping to protect employees who were working and exposed in the bottom of the excavation.

In accordance with section 9(a) of the Act, the citations provided that the violations be abated immediately upon receipt of the citation. Such periods of abatement were reasonable for the abatement of these violations.

## Secretary's Complaint.

## VI

The violation alleged in the citation as set forth in paragraph V(2) above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent, knew, or could with the exercise of reasonable diligence have known, of the presence of the violations. Said violation was also a repeated violation within the meaning of section 17(a) of the Act in that respondent had been previously cited for a violation of the subject standard.

## VII

The violation alleged in the citation as set forth in paragraph V(1) was a violation within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the work site. Said violation was also a repeated violation within the meaning of section 17(a) of the Act in that respondent had been previously cited for a violation of the subject standard.

## Secretary's Complaint.

## VIII

On August 16, 1973, a notification of proposed penalty for the citations was served on the respondent corporation, proposing a penalty of \$2,070. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

## IX

On September 5, 1973, the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citations and the proposed assessment of the penalty pursuant to the provisions of section 10(c) of the Act. This notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

## X

Several of respondent's employees are affected by the violations reflected in paragraph V herein. The authorized employee representative of the affected employees is UNITED STEELWORKERS OF AMERICA, LOCAL 15480, 104 Magnolia Street, Syracuse, New York. At all times relevant the said local union was certified as the collective bargaining representative of the affected employees of the respondent corporation and

## Secretary's Complaint.

at all times relevant herein it has had collective bargaining agreements with the respondent corporation.

WHEREFORE, the aforesaid citations and proposed penalty should be affirmed.

~~/s/ William J. Kilberg~~  
WILLIAM J. KILBERG  
Solicitor of Labor

/s/ Francis V. LaRuffa  
FRANCIS V. LA RUFFA  
Regional Solicitor

/s/ Theodore T. Gotsch  
THEODORE T. GOTSCH  
Attorney

UNITED STATES DEPARTMENT OF  
LABOR, ATTORNEYS FOR  
PETER J. BRENNAN, SECRETARY  
OF LABOR.

## Secretary's Complaint.

Notice to the OLIN CONSTRUCTION CO., INC.

You are hereby notified that you must plead or otherwise answer this complaint, either denying or admitting the allegations, within 15 days of your receipt of this complaint. Failure to do so may result in dismissal of your notice of contest. See Rule 33(b), Rules of Procedure, Occupational Safety and Health Review Commission.

**EMPLOYER'S ANSWER.**

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

-----  
PETER J. BRENNAN, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,

v.

OLIN CONSTRUCTION CO., INC.,

Respondent,

UNITED STEEL WORKERS OF AMERICA,  
LOCAL NO. 15480,

Authorized Employee  
Representative.

OSHRC  
DOCKET  
NO. 4450

-----  
ANSWER

DONALD J. BALL  
Attorney for Respondent  
Office & P. O. Address  
436 South Salina Street  
Syracuse, New York 13202  
Telephone: (315) 422-2148

Employer's Answer.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,

v.

OLIN CONSTRUCTION CO., INC.,

Respondent,

UNITED STEEL WORKERS OF AMERICA,  
LOCAL NO. 15480,

Authorized Employee  
Representative.

OSHRC  
DOCKET  
NO. 4459

ANSWER

Respondent by its attorney, Donald J. Ball, for its answer  
to the complaint herein:

1. Admits allegations contained in paragraphs "I," "II,"  
"III," "IV," "IX" and "X" of the complaint.
2. Denies allegations contained in paragraphs "V," "VI,"  
"VII" and "VIII" of the complaint.

WHEREFORE, respondent prays that the citation and proposed  
penalty of \$2,000.00 for the alleged serious violation of 29 C.F.R.

## Employer's Answer.

1926.652(b) as alleged in paragraph "V(2)" of the complaint be dismissed.



Donald J. Bail  
Attorney for Respondent  
Office & P. O. Address  
436 South Salina Street  
Syracuse, New York 13202  
Telephone: (315) 422-2148

EXCERPTS OF MINUTES OF HEARING,  
1-23-74.

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,

Complainant,

v.

OLIN CONSTRUCTION CO., INC.,

Respondent,

UNITED STEELWORKERS OF AMERICA,

LOCAL NO. 15480,

Authorized  
Employee  
Representatives

Docket  
No. 4459  
& 4413

U.S. Courthouse & P.O.  
101 No. Clinton Street  
Syracuse, New York

January 23, 1974  
10:00 A.M.

BEFORE:

JUDGE DAVID G. ORINGER

S. & S. REPORTING CO., INC.  
132 Nassau St.  
New York, N.Y.  
WO-2-2915  
2-2943

## A P P E A R A N C E S:

FRANCIS V. LA RUFFA, ESQ.  
Regional Solicitor  
United States Department of Labor  
1515 Broadway  
New York, New York  
BY: THEODORE T. GOTSCH, ESQ., Of Counsel

DONALD J. BALL, ESQ.  
Attorney for the Respondent  
436 So. Salina Street  
Syracuse, New York 13202

## P R E S E N T:

MR. HAROLD PAULY

MR. CHESTER C. WHITESIDE  
Area Director  
Syracuse Area Office  
Room 203  
Midtown Plaza, Syracuse

\* \* \* \* \*

## Discussion.

The legal name of the Respondent is Olin Construction Company, Inc. It is a New York corporation with the principal offices in Camillus, New York.

The question as to whether or not the Respondent has been engaged in business affecting commerce, this, I believe, was admitted in their pleadings.

JUDGE ORINGER: All right, go ahead.

MR. BILL: Relative size of the Respondent in the geographic area is probably one of the larger.

I cannot tell you exactly numerically where it stands, but it is one of the larger construction companies in the area.

JUDGE ORINGER: Let me ask one question.

Your client makes and gets interstate telephone calls.

MR. BILL: Yes.

JUDGE ORINGER: And they get materials shipped in from outside of the state?

MR. BILL: Yes.

JUDGE ORINGER: I would like to have some elements in the record, that's the reason why

## Discussion.

I ask those questions.

They also have mail coming in and out of the State; is that correct?

MR. BALL: Yes.

The relative size I put in the record already.

I cannot tell you the net worth, but the approximate sales for the past fiscal year was approximately \$5,000,000.

There were no injuries involved at the time and place of the alleged violations.

There is no question of ownership and control of the equipment involved, as far as I know of.

There were approximately 150 employees employed daily by the Respondent.

Incidentally, when I talk about Respondent, I am talking about the Respondent employer because of the non-appearance of the union.

JUDGE GRINGER: Yes.

MR. BALL: Insofar as the previous violations, on or about June 12, 1973, there was a violation by -- issued for an occurrence in

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.

Harold Pauly for Department, Direct.

15

It was consolidated by another Judge, and I think in his wisdom it is best for the expedition of the proceeding to proceed along those lines.

Now, Gentlemen, is there anything else that you can stipulate to?

MR. GOTSCH: I don't believe so.

JUDGE ORINGER: Are you ready to open, Mr. Gotsch?

MR. GOTSCH: Yes.

The Secretary of Labor would forego any opening statement, and is ready to proceed by calling its first witness.

MR. BALL: I would as soon waive opening statements and get into the evidence.

JUDGE ORINGER: All right, Gentlemen, you may proceed.

Mr. Witness, please sit over here.

\* \* \*

Thereupon,

HAROLD PAULY,  
was duly called as a witness for and in behalf of the  
Secretary of Labor, United States Department of Labor,  
and being then and there duly sworn by Judge Oringer,

Harold Pauly for Department, Direct.

assumed the witness stand, and upon examination, testified as follows:

JUDGE ORINGER: What is your name?

THE WITNESS: Harold Pauly.

JUDGE ORINGER: You may proceed.

DIRECT EXAMINATION

BY MR. GOTSCH:

Q By whom are you employed?

A The United States Department of Labor.

Q How long have you been so employed?

A Two and a half years.

Q What is your position with the United States Department of Labor?

A Industrial Hygienist and Compliance Officer.

Q And where are you stationed?

A Syracuse area office.

Q And the area office of what administration?

A The United States Department of Labor, Occupational Safety and Health Administration.

Q All right. And, Mr. Pauly, could you tell me something about your past background?

What was your educational experience?

A I have a BS and MS in geology.

Q And what was -- what university was that?

A Miami University, Oxford, Ohio.

Q Mr. Pauly, you stated that you had a BS and MS in geology. Did you do any -- what other jobs have you had since you have finished your schooling?

A I worked eight years as a geologist and ten years with a large chemical firm before joining the United States Department of Labor.

Q You stated that you had educational and also working experience as a geologist.

Did you ever have any occasions to make any studies of soil?

A Yes. I have had courses in paleontology and identification of rocks and soils and have performed analyses of sizes of grains and matter contained in soil.

I have, like I say, spent eight years in the field of crawling and walking over countless miles of soil and rock, so I am very well acquainted with it.

Q All right. And, Mr. Pauly, how many years have you been making inspections with the Occupational Safety and Health Administration?

A Two and a half years.

Q About how many inspections would you estimate that

\* \* \* \* \*

Harold Pauly for Department, Direct.

JUDGE ORINGER: All right. Now, suppose counsel get together with me for three minutes while everybody else goes outside.

THE WITNESS: May I say something?

It might be a good idea to call Mr. Whiteside because he would --

(Discussion off the record.)

MR. BILL: Prior to taking a short recess, I stated I would prefer cross-examining the witness at this point.

If it is agreeable to the Court, I will withdraw that motion at this point and allow Mr. Gotsch<sup>to</sup> present his entire situation as to both violations, and I will proceed with my cross-examination at the proper time.

JUDGE ORINGER: That motion is granted.

You may proceed then, Mr. Gotsch.

CONTINUED DIRECT EXAMINATION

BY MR. GOTSCH:

Q You noted earlier that you made an inspection of Olin Construction Company on August 9, 1973; is that correct, Sir?

A Yes.

Q Could you describe for the Court where this

Harold Pauly for Department, Direct.

inspection took place?

Let me give you the file for the August 9th inspection.

(Handing. Reading.)

A 7037 Lakeshore Road. I have got the name Sullivan down here.

Q And what did you observe at this job site?

A An open and unshored trench.

Q Now, Mr. Pauly, I have some additional --

MR. GOTSCH: I would like to have these marked for identification.

(Three photographs -- received and marked for identification as Exhibits C-4, 5 and 6, respectively, as of this date.)

Q Mr. Pauly, I have Exhibit C-4, for identification. Could you identify that for the Court?

(Handing.)

A It is a trench, the trench we are talking about, 7037 Lakeshore Road.

Q Now, on what date was that photograph taken?

A August 9th.

Q And who took this photograph?

A I did.

Q What camera did you use in taking this photograph?

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, Direct.

44

A A Kodak Instamatic.

Q Was this the camera supplied to you during the course of your duties in the Department of Labor?

A Yes, Sir.

Q And is this -- how was this photograph developed?

A The Allen Photo Company.

Q Did you take the film to that Company?

A Yes, Sir.

Q And is this photograph a fair and accurate representation of what you observed on that date?

A Yes, Sir.

MR. GOTSCH: Your Honor, I offer Exhibit C-4, for identification, into evidence.

JUDGE DRINGER: Any objection, Mr. Ball?

MR. BALL: If it is offered purely for a general observation of the situation, I have no objection.

JUDGE DRINGER: He is offering it for what he observed that day, as a fair and accurate representation.

I take it that this is what you saw on that day, that it is a fair and accurate representation of what you saw?

Excerpts of Minutes of Hearing, 1-23-74.

45

Harold Pauly for Department, Direct.

THE WITNESS: Yes.

JUDGE ORINGER: Mark this into evidence.

(Photograph -- received and marked in evidence, instead of and in place of identification, as Exhibit C-4, as of this date.)

Q Mr. Pauly, Exhibit C-5, can you identify that for the Court, please?

(Handing.)

A This view shows me measuring the depth of the trench.

JUDGE ORINGER: How high is that ruler.

THE WITNESS: It is folded over at the 6 foot mark.

Q Mr. Pauly, who took this photograph?

A Mr. Whiteside.

Q Was this taken with the same camera as Exhibit C-4?

A Yes, Sir.

Q And was the film developed in the same way?

A Yes, Sir.

Q Is this an accurate representation of the view of the conditions that you observed on the date of the inspection?

A Yes, Sir.

MR. GOTSCH: On that basis, I offer

Exhibit C-5 into evidence.

JUDGE ORINGER: Any objection?

MR. BALL: I won't object to that, Your Honor.

JUDGE ORINGER: Admit it in evidence.

Mark it.

(Photograph -- received and marked in evidence, instead of and in place of identification, as Exhibit C-5, as of this date.)

JUDGE ORINGER: I will say that if there were a technical objection, you would still be able to get it in, but you would have to do it with Mr. Whiteside. Go ahead.

Q All right. Mr. Pauly, Exhibit C-6, would you identify that document for the Court.

(Handling.)

A It is a view of myself standing in the trench.

Q And who took this photograph?

A Mr. Whiteside.

Q Was this taken with the same camera that was used in Exhibit C-4?

A Yes, Sir.

Q And was it processed for developing in the same way?

A Yes, Sir.

Q And is this a fair and accurate representation of the conditions that you observed on August 9, 1973?

A Yes, Sir.

MR. GOTSCH: I offer this Exhibit C-6 into evidence.

MR. BALL: No objection.

JUDGE ORINGER: Admit it into evidence.

(A photograph -- received and marked in evidence, instead of and in place of identification, as Exhibit C-6, as of this date.)

Q Mr. Pauly, Exhibit C-4 is a photograph.

Could you explain to the Court what you observed as depicted in Exhibit C-4?

A Well, this picture was taken to aid in our establishing that there was an exposure, for instance, the ladder leading down into the trench

The other views show the tools and shovels and so forth.

That was primarily the reason for this particular picture.

Q I see. Mr. Pauly, what were the dimensions? Did you make any measurements of the excavation in question on August 9th?

A Yes, Sir.

Q And what was the depth that you found in your measurements of this excavation?

A As I said a moment ago, the one picture --

Q All right, let me show you Exhibit C-5.

A That is folded on the 3-foot mark. That is my ruler, it is a 10-foot ruler, and I said in my report 8 to 9 feet deep, and I am looking upwards, so I cannot really estimate precisely whether it is 8 feet or 9 feet.

JUDGE ORINGER: I am convinced it is over 5 feet.

Q And how tall a man are you, Mr. Pauly?

A Six feet.

Q Mr. Pauly, in Exhibit C-4, I see some sheeting placed in the trench.

A Yes, Sir.

Q Is this -- would this be adequate protection for employees working in trench?

A Not where the work was being performed, no, Sir.

JUDGE ORINGER: I did not hear that.

THE WITNESS: Not where the work was being performed, no, Sir.

Q All right. Where was the work being performed in this trench?

A The work was being performed directly beneath the portion you cannot see. Well, where I am standing, and where I am taking the measurement, to be more precise.

Q And in that portion there was no sheeting present?

A No, Sir.

Q All right. Now, Mr. Pauly, did you make measurements as to the length of this trench?

A Yes, Sir.

Q And what did you determine the length of the trench to be?

A Twelve to fifteen feet long.

Q And how do you explain the variance in the length of this trench, 12 to 15 feet.

A Actually, the trench, as you can see in this picture, is two portions, one wider elliptical portion and one smaller elliptical portion.

It is narrower at the neck and wider in the middle.

Q Did you make any measurements of the width of this trench?

A Yes, Sir.

Q And what was the width?

A I said 9 to 10 feet wide.

Q And what was -- what type of soil did you observe --  
what soil conditions did you observe in this  
trench?

A Loose, unconsolidated soil.

Q And what elements made up the loose unconsolidated  
soil?

A Sand and silt, and loam.

Q Was it the same type of lake bottom material that  
you had observed on your previous inspection?

A Yes.

Q And would you characterize this as more stable or  
less stable than average soil?

A Less.

Q Less stable?

A Yes, Sir.

Q Did you observe any angle of repose in use in this  
excavation?

A No, Sir.

Q Did you observe any shoring -- where employees  
were exposed, did you observe any shoring?

A No, Sir.

MR. BALL: I object to the word where.

Excerpts of Minutes of Hearing, 1-23-74.

Harold Pauly for Department, Direct.

51

JUDGE ORINGER: Sustained.

I heard nothing about any employees.

MR. GOTSCH: All right, I will get to  
that point.

Q Mr. Pauly, did you observe any employees exposed?

A Did I see any employees in this trench working?

Q Yes.

A No, Sir, I did not.

Q Did you observe any employees' implements in the  
trench?

A Yes, Sir.

Q What implements did you observe?

A Shovels, crowbars, some material in a tin can  
used to join the pipes together, and so forth.

Q In the location where you found these shovels and  
crow bars and other material, did you observe any  
shoring in use?

A No, Sir.

Q Any sheeting?

A No, Sir.

Q Bracing?

A No, Sir.

Q There is no sloping of the excavation at that point?

A No, Sir.

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, Direct.

52

Q Were any other means of support being used?

A No, Sir.

Q Mr. Pauly, did you discuss this matter with any representatives of Olin Construction Company?

A Yes, Sir.

Q Who did you speak to?

A The foreman, Mr. Timothy Duerr.

Q And did you ask if any employees were working in this excavation?

A Yes, Sir.

Q And what did Mr. Duerr respond?

A He said there were two employees who had been working in the trench.

Q Did you get the names of those employees?

A Yes, Sir.

Q What were their names?

A Mr. Ernest Cristian and Kenneth Spainglar.

JUDGE ORINGER: Did he tell you where in the trench they were working?

THE WITNESS: Yes, Sir, where the shovels were located.

JUDGE ORINGER: And where were the shovels located in relation to the picture?

THE WITNESS: Well, which picture?

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, Direct.

53

MR. GOTSCH: Exhibit C-5, where you are standing with the ruler.

THE WITNESS: Right where I was standing.  
In fact, you can see the shovels in the picture.

JUDGE ORINGER: All right, go ahead.

Q Did you speak to any other management representatives of Olin Construction Company?

A I don't recall whether I did directly or whether Mr. Whiteside did.

Q Mr. Pauly, was there any discussion as to the abatement of this -- of these violations?

A I did not hear the conversation, this type of conversation.

Q Now, Mr. Pauly, did you observe any conditions with respect to excavating material placed near the edge of the trench?

A Yes, Sir.

Q And what did you observe with respect to this?

A Not in a place a minimum or maximum of 2 feet from the edge of the trench.

JUDGE ORINGER: It is my understanding that this is not contested.

MR. GOTSCH: At this point, I would ask

Mr. Pauly about the computations of the proposed penalties for -- I will have to go back to the August 3rd inspection and the penalties there, and then go into the August 9th inspection.

JUDGE ORINGER: All right.

Q Mr. Pauly, could you explain to the Court how the proposed penalty for the serious -- the alleged serious violation was assessed?

A Well, the basis for a serious violation is one that causes death or serious physical harm.

Q Did your observation lead you to believe that this excavation, this failure to slope or shore or otherwise this excavation could cause such serious injury or death?

A Yes.

Q And, therefore, you designated this as a serious violation?

A Yes, Sir.

Q What is the unadjusted penalty for a serious violation?

JUDGE ORINGER: well, what is the danger?  
When you fail to slope -- assuming that the Respondent had failed to slope, shore, sheet

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, Direct.

55

or brace, what danger are you exposed to?

THE WITNESS: Sides of the trench caving in and covering the employee and suffocating the employee.

JUDGE ORINGER: And can this cause serious injury or death?

THE WITNESS: Yes, Sir.

JUDGE ORINGER: Go ahead.

Q All right. Mr. Pauly, were representatives of Olin Construction Company aware that this condition existed?

A Yes, Sir.

Q Which representatives?

A Mr. Murphy.

Q Now, what -- how did you derive the final ultimate penalty that was proposed for this violation?

A We have factors, good faith, size of the corporation and the history.

Good faith is an evaluation of the safety program based on their record.

We gave them 20 percent, the highest we could give them.

Q All right. What went into your thinking with respect to an evaluation of their safety program?

A They had maintained their records. They had done most of the -- most of everything we observed. They had a fairly good safety program based on our observations of the records, on the material that they had, the trucks and the cranes and so forth.

Q All right. Were you --

JUDGE ORINGER: Did you feel they were safety conscious?

THE WITNESS: Yes, to a certain extent.

Q Now, how much credit did you give them for good faith?

A 20 percent.

Q And what was the unadjusted penalty for the serious violation? What figure did it start with?

A \$1,000.

Q Were you able to give the Respondent any credit for size?

A No, Sir.

Q Why didn't you give them credit for size?

A They had over 100 employees on the site.

Q How about past history of the Respondent?

A Well, we considered this an initial visit.

They had no prior visits for OSHA, so we gave them

the maximum amount of reduction.

Q And what was the total reduction that you gave them?

A 40 percent.

Q And what did that make the ultimate proposed penalty?

A \$600.

JUDGE ORINGER: We are now talking about the serious violation, Citation No. 1, alleged violation of 652(b)?

MR. GOTSCH: Yes.

Q All right. Mr. Pauly, as a result of your inspection on August 9th, 1973, you also proposed penalties.

Could you describe for the Court how you arrived at the penalties that were assessed after your second inspection.

A We started with a base figure of twice the original amount, which is \$2,000, because it was a repeated violation.

We gave them credit of -- we gave them no credit for good faith because of their failure to remove that, based on the original inspection.

We gave them no credit for size, and we gave

them 10 percent for history, based on the fact that this was a second visit.

So we gave them a 10 percent reduction.

Q And --

A Or \$200, which would leave a total of \$1,800.

Q And how did you arrive at an unadjusted penalty of \$2,000.

A We doubled the original penalty amount of \$1,000.

Q And what -- was -- what type of violation did you consider this to be?

A A repeated serious violation.

Q A repeated serious violation?

A Yes, Sir.

Q Now, Mr. Pauly, there was a second item of the citation, which also resulted in a proposed penalty. The facts of that citation are not in dispute, but the computation of proposed penalty is. Could you explain for the Court how you arrived at a proposed penalty for the second item, and that was the violation of 1926.651(i)(1)?

A We doubled the original violation. It was \$300 originally on the first visit, and we doubled that amount to \$600, and gave them the

same penalty reduction.

Q Now, Mr. Pauly, how did you arrive at the unadjusted figure initially? What factors entered into your mind when you developed the unadjusted penalty?

JUDGE ORINGER: I don't know what you mean initially? Are you talking about the first citation or the second?

MR. GOTSCH: In a manner of speaking, I think he has to go back to the first.

JUDGE ORINGER: The first uncontested citation; is that right, that was not contested?

MR. GOTSCH: That is right.

JUDGE ORINGER: Now, go on from there.

Q All right. Mr. Pauly, would you mind explaining how you developed the first penalty for this uncontested violation?

JUDGE ORINGER: Give us what section was allegedly violated.

MR. GOTSCH: This is 1926.651(i)(1).

JUDGE ORINGER: What did you allege that they did?

The allegation reads, "Failure of employer to store excavated material at least

\* \* \* \* \*

the August 9th inspection?

A Yes, Sir.

Q With respect to this 651(i)(1) violation?

A Yes, Sir.

JUDGE ORINGER: Let me ask you a question.

What can happen -- assuming that that violation existed, what is the danger of having excavated material too close to the edge of the trench?

THE WITNESS: Two things, the material itself could fall into the trench, and also the added weight at the edge of the trench could cause the edge of the trench to fall in.

JUDGE ORINGER: As a result, what would happen?

THE WITNESS: The entire side of the trench could fall in on the employee.

JUDGE ORINGER: You consider that non-serious?

THE WITNESS: I considered the excavated materials on the edge of the trench non-serious because, basically, the weight force is perpendicular, straight down. So I just

figured that as being less serious than the unshoring.

JUDGE ORINGER: Aren't there times when the same situation would be serious?

THE WITNESS: When the trench is deeper and there is something heavier at the edge of the trench, yes, that could be considered serious.

Q Mr. Pauly, what was the unadjusted penalty that you arrived at?

A \$125.

Q Well, the unadjusted penalty initially.

A \$300, I'm sorry.

Q \$300?

A Yes.

Q Now, what adjustments did you allow on the August 3rd inspection?

A 40 percent.

Q Was that based on the same criteria that you enumerated earlier for the serious violation?

A Yes, Sir.

Q That was good faith -- 20 percent for good faith and 20 percent for history?

A Right.

\* \* \* \* \*

Q Is that your testimony?

A I am saying that as a matter of opinion. I did not measure it.

Q And you think --

A You are asking me is the bottom of the trench as wide as the top?

Q Yes, Sir, I am asking you if the bottom of the trench --

A It could be, yes, Sir.

Q And it came up basically at a 90 degree angle?

A Approximately, yes.

Q And then you had the spill contiguous or adjacent to it; is that right?

A That is right.

JUDGE ORINGER: I take it for granted that if a compliance officer deems the trench to be unsafe, he would not go into it to measure the bottom.

Go ahead. I have already decided that in the case.

Q Now, did you actually see men working at the trench, Mr. Pauly?

A No, Sir.

Q I believe you referred to information contained

\* \* \* \* \*

A One other thing, it has to be at the approval of my Area Director, so it is not my decision alone.

Q Your personal opinion, he ran a pretty good shop, didn't he, he was knowledgeable and observant of the rules and regulations of OSHA and tried to observe them?

A Yes, Sir.

Q Let me ask you a few questions now in reference to the violation --

JUDGE ORINGER: Let us not lose the official marked exhibits.

MR. BALL: I am trying to keep it together, Your Honor.

Q Now, this is a violation which is supposed to have taken place on August 16th; is this correct, we are talking about the August 16th violation?

A August 9th, you mean?

Q Yes, August 9th, I am sorry.

This was near 7067 Lakeshore Road?

A Yes, Sir.

Q I show you Exhibit C-4, and I ask in which direction the trench is running?

(Hanging.)

A North-south.

Q And you took that picture, I believe.

A Yes, Sir.

Q And where were you standing when you took the picture?

A In the roadway.

Q So that the house as indicated on the picture, and where the ladder is indicated, that is on the south extreme end of the ditch and you were standing on the north side of the ditch?

A No, just the other way around.

Q You are standing on the roadway?

A Yes, Sir, which is on the south side, and this is looking north, towards the lake.

Q You are standing on the outside of the road?

A Yes, this is the road where I am standing, taking the picture, and the trench is running north-south, so --

Q Well, if you are standing -- I am not trying to argue with you, but if you are standing on the -- yes, standing on the south side of the north roadway --

A Well, which are you asking me?

Q Let's start all over again.

Where were you standing when you took the picture?

A I am standing at the south end of the

trench.

Q You are standing at the south end of the trench on the roadway?

A Which would be on the north side of the roadway.

Q And that would be on the north side of the roadway?

A Yes.

Q Okay. So that the building that is showing and where the ladder is, that is the north side of the trench and where you are is the south side?

A Yes.

Q And there is a pipe crossing the trench; is that correct?

A Yes.

Q And is that a gas pipe? Do you know?

A I have no idea what it was.

Q And southerly of that gas pipe, towards the house --

A Yes, Sir.

Q -- there is shoring; is that correct?

A Yes, Sir.

Q Now, is that proper shoring? I want to understand --

A Which shoring?

Q There is shoring.

A Yes.

Q And when you issued the citation involved here, you issued it for that portion of the trench?

A No, Sir.

Q If the trench had ended at the pipe where the pipe crosses, would you have cited the violation?

A Yes, Sir.

Q You are saying that this is improper shoring?

A We did not evaluate it from that standpoint. They had to enter through that end, obviously, where the ladder is, but I would, in my own opinion, say that that would not represent proper shoring, but I am not a construction expert either.

Q Well --

A No, this would not be proper.

Q You are an enforcement officer, aren't you?

A It is not braced at the bottom. If the wall would cave in, the bottom would close up.

Q If the bracing were there, I mean --

A If you are asking me if I feel that that is proper shoring, I would answer no, that that is not proper shoring.

Q And I will ask you the question why, because the

bottom is not braced?

A The bottom is not braced, yes, Sir.

Q Now, where were the measurements actually taken in this trench?

A Where I am standing.

Q As shown -- and that is a picture of you inside the trench?

A Yes, Sir.

Q I ask you if you have an opinion as to the width of the bottom of the trench.

A Well, I would say approximately the same width as the top, approximately.

Q Now, I believe you testified that the top of the trench was approximately 9 to 10 feet wide; is that correct?

A Yes.

Q Which means that the bottom of the trench also would be 9 to 10 feet wide; is that correct?

A Yes.

Q And there was no angle of repose at this point; is that correct?

A No, Sir.

Q So that the sides would be at a 90 degree angle?

A That is correct.

Q And you cited this violation and you called it a serious violation?

A That is correct.

Q Because if you felt there was anybody in the trench, somebody might be hurt; is that correct?

A Yes, Sir.

Q And yet you made it a repetitive or -- a violation because of the previous violation occurring on August 3rd; is that correct?

A Yes, Sir.

Q Was there anyone -- on August 9th, as shown in Exhibits 4, 5 and 6, they -- do they show any employees in the trench?

A No, Sir.

Q And did you see any employees in the trench?

A No, Sir.

MR. BALL: I have no further questions.

JUDGE ORINGER: Do you have any redirect, Mr. Gotsch?

MR. GOTSCH: Just a couple of questions, Your Honor.

JUDGE ORINGER: Go ahead.

REDIRECT EXAMINATION

BY MR. GOTSCH:

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, Redirect.

95

Q First of all, Mr. Pauly, with respect to that August 9th inspection, how did you make a determination that employees were exposed to this ladder -- this trench?

A The access ladder, the tools at the bottom of the trench, the shovels and can with whatever material was in the can, rags and various implements of use that would have to be used by somebody.

Q And had the foreman made any statement to you with respect to employees?

A Yes, Sir.

Q And what -- what was that gentleman's name again?

A Mr. LaFleur, I believe his name is.

Mr. LaFleur is the name as I recall. It is in the record somewhere.

MR. BALL: Mr. Duerr.

THE WITNESS: Now, wait a minute, is that the first or the second situation?

Q August 9th.

A That was not Duerr on August 9th.

Q Look at your notes.

MR. BALL: Then I withdraw my statement.

JUDGE ORINGER: Look at your notes.

(Handing. Reading.)

THE WITNESS: To my thinking Duerr is  
the foreman, you are right. I am sorry,  
Ronald LaFleur was the superintendent.

Q Getting back to the first inspection on August  
the 3rd, you stated that you spoke to an employee,  
Joseph Loop, and what was Mr. Loop's occupation?

A Laborer.

Q And what, if anything, did he tell you about his  
job?

A He had been working in the trench.

Q Earlier that morning?

A Yes.

Q Was Mr. Murphy present at the time you discussed  
this with Mr. Loop?

A I don't recall that he was.

Q And the exhibits generally speaking, 1 through 6,  
accurately show the soil conditions that you  
observed on that day?

A Yes.

Q How did you happen to -- well, I see you are  
standing in Exhibit C-5 and Exhibit C-6.

I see you are standing in the unprotected part of  
the excavation. How did you happen to go down there?

A The ladder was available.

Q And there was no ladder available at the time of the first inspection; is that right?

A That is right.

MR. GOTSCH: I have no further questions.

JUDGE ORINGER: Anything else?

MR. BALL: Just a couple of questions.

RECROSS EXAMINATION

BY MR. BALL:

Q Did Mr. Loop, and we are now talking about the first so-called violation, besides saying that he was a laborer, tell you what he was doing in the ditch earlier that day?

A No.

Q Do you know what a laborer does in a ditch?

A Digs.

Q Does he lay pipe?

A He lays pipe.

Q Did you see any pipe laid?

A No.

Q So you don't know whether he was actually --

A No, I did not observe him in the trench.

Q And if there had been a ladder in the first trench, would you have gone down and made

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.  
Harold Pauly for Department, By Judge Oringer.

99

JUDGE ORINGER: Why did you go into that trench the second time knowing that it was a dangerous area?

THE WITNESS: To take measurements of the depth.

JUDGE ORINGER: Don't you think that you were endangering your person when you did so?

THE WITNESS: Certainly.

JUDGE ORINGER: Is it your instruction to do that, to go down and measure the depth?

THE WITNESS: It was on this occasion, yes, Sir.

JUDGE ORINGER: I am curious about that second violation, that second admitted violation of having a fill piled closer to the trench than 2 feet.

How come, after it was -- how come on the second time you gave 10 percent for good faith and 50 percent for prospective abatement when it was not abated the first time?

THE WITNESS: It was abated the first time.

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, Direct.

P.M. SESSION

101

(Hearing resumed at 2 P.M.)

JUDGE ORINGER: All right Gentlemen,  
let's proceed.

MR. GOTSCH: I call Mr. Whiteside, the  
Area Director.

\* \* \*

Thereupon,

CHESTER C. WHITESIDE,  
was duly called as a witness for and in behalf of the  
Secretary of Labor, United States Department of Labor,  
and being then and there duly sworn by Judge Oringer,  
assumed the witness stand, and upon examination,  
testified as follows:

JUDGE ORINGER: What is your name?

THE WITNESS: Chester C. Whiteside.

JUDGE ORINGER: You may proceed.

DIRECT EXAMINATION

BY MR. GOTSCH:

Q In your capacity as the OSHA Area Director, do  
you, from time to time, conduct inspections of  
employers?

A No, Sir, I don't conduct the inspections as  
such. I go with compliance officers for purposes  
of evaluating their effectiveness and in some

\* \* \* \* \*

I did that to establish exposure.

Q All right. And Mr. Whiteside, I believe you --  
did you involve yourself in the measurement of  
the width and the length of this trench?

Mr. Pauly had testified that he was involved in  
that earlier.

A Mr. Pauly did that, more or less, at my direc-  
tion, and I, of course, was able to see him do it.

We were all standing around watching this.

Q All right. Mr. Whiteside, I would like to go  
over now to the August 9th inspection.

I have --

JUDGE CRINGER: Let's find out if

Mr. Whiteside was present at that inspection.

Q Mr. Whiteside, were you present on August 9th,  
when Mr. Pauly testified that he made an inspec-  
tion of Olin Construction Company?

A Yes, Sir.

Q All right. And on August 9th, did you go back to  
the scene of the first inspection?

A We had passed it. That condition had long  
been abated.

Q That was abated?

A Yes, Sir.

Q And --

A Promptly, I might add.

Q Now, the site of the second inspection, was that --  
how close to the first inspection was this site?

A It was on the same road, but it is not  
geographically close. I think a conservative  
estimate in all candor would be a mile away.

I don't think I would miss that. This was a  
continuing part of a large major pipe operation,  
extending some, I think Mr. Sherman Olin told me,  
20 miles, 19 or 20 miles, and this second inspec-  
tion was at least a mile distant from the other.

I might also add that for the purpose of  
geographical designation, when we get into east,  
west, north and south, this road is not a straight  
road. This road makes many turns. It follows  
generally the contour of the lake.

So this point -- the second point of inspec-  
tion was a minimum of a mile away from the first  
one.

MR. BILL: East, west --

THE WITNESS: You have to excuse me, I  
have to close my eyes and get my directions  
going.

It would have been east of the first site.

Q And, Mr. Whiteside, just to completely cover the first inspection, at the time you made your observation on August 3rd, did you notice any shoring, sheeting, bracing, sloping or other means of support in this excavation?

A No, Sir, at this first site there was no evidence of shoring or sheeting or bracing, nor was there any indication that it was going to be used.

Q All right. Now, going over -- you were present on August 9th, and do you recall the circumstances of that inspection from your memory at this point?

A As to how we got there or why? What do you --

Q Well, the details of your observations made on August 9th.

A Yes, as we approached the site of the second work place, there was a little flurry of activity because we had become highly visible at that point.

There was no mistaking who we were by the color of the car, the license plate and my bad looks, I am sure.

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, Direct.

114

We could hear with the window down, people began to say, "Here they come," this sort of thing, and, of course, this is all right, but we did observe a mound of dirt which -- from that distance, which prompted me to ask that we stop and take a look at it.

Q Yes.

A We felt that it was in the purview of our job, so we did it.

Q Did you observe any employees in that trench?

A Not in the trench, but coming out of the trench.

Q At the time?

A I observed an employee coming from the trench at the edge where the ladder was located.

JUDGE ORINGER: How did he get out

THE WITNESS: Up the ladder and out, as

I was walking towards the excavation site, the employee was coming out of the trench.

Q Did you observe him on the ladder at that point?

A I observed him as he left the ladder or -- it is hard to say if he was on the ladder or off the ladder. But to see someone in motion coming out is what I am trying to say.

Q All right. And did you observe any shoring, sheeting, bracing or other means of protection with respect to this trench?

A Yes, from the photographs that have already been shown, and I recognize and remember distinctly that there was a brace of plywood --

Q You are speaking of Exhibit C-4?

A This I observed as is photographed.

Q And how about in the other portions of the trench? Was there any other means of protection?

A No.

Q No means of protection?

A No, Sir.

Q Observing Exhibit C-5 and Exhibit C-6, did you take these photographs?

(Handing.)

A Yes, this is my handiwork.

Q All right. And did you ask Mr. Pauly to make that measurement?

A Yes, after -- first, I wanted to establish the depth and this was a means towards doing that, a rather dangerous one, but it was a means.

MR. BALL: A rather what?

THE WITNESS: It was a dangerous one.

\* \* \* \* \*

A Yes, it would be.

Q All right.

(Hanging. Reading.)

Q Let me give you that record of the August 9th inspection.

A Well, the foreman was, if I am going to pronounce this wrong, my apologies, Timothy Duerr, of Pennelville.

Q And was there any other representative of Olin present?

A A laborer, Mr. Cristian, Mr. Ernest Christian, and Mr. Kenneth Spainglar.

Q All right. Did Mr. Duerr say anything with respect to the employees who were working in the trench?

A I asked him and, of course, he told me that there were people there. There was this Mr. Spainglar and Mr. Cristian. Of course, I also double checked that by asking them.

No one ran away, everybody was there.

Q All right. Did you observe any tools in this excavation?

A Yes, a hand shovel, a long iron instrument that in my language I would probably call a

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, Cross.

118

crowbar or something like that. I don't know what it is in the language of pipeline construction, and there is also something like wadding and -- or whatever you may use to pack around joints.

Again, my experience there is extremely limited.

MR. GOTSCH: I have no further questions.  
of Mr. Whiteside.

CROSS-EXAMINATION

BY MR. BALL:

Q Mr. Whiteside, the first inspection that you made, which is before the Court at this time, was on August 3rd, 1973; is that correct?

A Yes, Sir.

Q Now, were you or had you observed the general construction being carried on on this project prior to that time, prior to August 3rd, 1973?

A If I interpret your question, as of -- did I have any knowledge that the Olin Construction Company was doing work there, the answer is yes.

Q But more --

A Not at that specific place, however.

Q More than just the knowledge that work -- I mean,

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, Cross.

145

JUDGE ORINGER: Does that actually refresh your recollection of having been there or are you just reading the report of it?

I mean, there is nothing evil -- there is no kind of evil connotation involved here. Does this refresh your recollection of having been there?

THE WITNESS: Yes.

JUDGE ORINGER: Go ahead, Sir.

Q I believe you testified that when you approached, you saw a workman coming out of the trench or as shown upon Exhibit C-4, he was on the ladder, in the motion of coming out of the trench; is that correct?

A Yes, I did.

Q And where he was in the trench, if he was in the trench, you do not know?

A No, Sir.

Q You did see some sheeting in the trench as shown upon Exhibit 4; is that correct?

A I saw an attempt at sheeting, yes.

Q Well, does the photograph, Exhibit C-4, properly represent what you saw?

A Yes, Sir.

Q And in your opinion, was this an unsafe trench that you saw?

A Yes, Sir.

Q And was the entire trench unsafe where there was sheeting and where there was no sheeting?

A That would call for an opinion, and my opinion is that the entire trench itself was unsafe.

Q And again, did you make any observations or --

MR. BALL: Withdrawn.

Q Did you make any measurements as to the width of the trench at the top?

A Personally, no, Sir, not that I can recall.

Q And did you make any measurements of the width of the trench at the bottom of the trench?

A Other than visual observations, no.

Q And was there any angle of repose to the sides of the trench?

A Some, yes.

Q There -- was it a 90 degree angle?

A It was straight down.

Q Was or was not.

A It was not straight down.

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, Cross.

147

Q And in addition to that, there was whatever is shown in Exhibit 4 as to the sheeting that was contained in a part of the trench.

There was in addition to the sloping, also sheeting in a part of the trench; is that right?

A There is a piece of plywood on -- at a part of this trench held together by a brace, which is an attempt at sheeting or bracing, your choice of words.

Q And does Exhibit C-5 also show that there was additional plywood available for sheeting of the other side, of the remainder of the trench?

Do you see that in there, Mr. Whiteside?

A I can look at this photo and see a piece of plywood, but it would be presumptuous of me to say that that is what -- what that plywood was there for.

Q You do see a piece of plywood?

A It appears to be a piece of plywood with a man standing on it, yes.

Q And you did --

A There was no indication at that time that he was going to use it.

Q And you did allow the -- Mr. Tully to enter the

\* \* \* \* \*

MR. GOTSCH: Well, let me just --

JUDGE ORINGER: All right, let's have  
a two-minute recess.

(A short recess was taken.)

Q Mr. Whiteside, with respect to Exhibits C-5 and  
C-6, which show Mr. Pauly standing in this exca-  
vation, in C-5 taking a measurement, did you  
order Mr. Pauly into that excavation?

A With a great deal of reluctance, yes, Sir.

Q Why did you have a great deal of reluctance order-  
ing him there?

MR. BALL: I will object to that. I  
think the question is did he or didn't he.

JUDGE ORINGER: I am sorry, what was  
the objection.

MR. BALL: The characterization of the  
answer with a great deal of reluctance.

JUDGE ORINGER: I will allow it for  
what little it is worth.

MR. BALL: All right.

Q Answer yes or no, Mr. Whiteside.

Did you order Mr. Pauly into that excavation?

A Yes, Sir.

Q And why did you order him into this excavation?

A To establish beyond a reasonable doubt the depth of this trench or excavation.

Q Did you feel that this was a safe thing to do?

A No, Sir, not really. I had some reservations about it.

Q Could you explain why, in view of your reservations you still sent Mr. Pauly into the excavation?

A Well, I knew that this was the second experience that I have had or the Syracuse Area Office had had with the employer.

I kind of anticipated some rebuttal, and I wanted to strengthen our position, being able to identify the depth, so I asked Mr. Pauly to step in, in view of the fact that there was no activity at that time.

Hopefully, it was to get in and take the picture and get out. In many instances, we are obliged to expose ourselves to the hazards that we are citing.

Mr. Pauly does so daily in taking various industrial hygiene tests in explosive atmospheres. There is no way --

MR. BALL: I will object to this. I

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, By Judge Oringer.

154

THE WITNESS: Yes, Sir.

JUDGE ORINGER: Do you know whether this was virgin earth or old fill?

THE WITNESS: Which work site, the first one or the second one?

JUDGE ORINGER: The first one, let's start with that.

THE WITNESS: Since part of this involves a road bed or road fill, it would be logical to assume that someone at one time had dug there because the road is there.

JUDGE ORINGER: Were there any pipes at all in there? Do you know?

THE WITNESS: In the No. 1, as I recall, I did not see any.

JUDGE ORINGER: How about No. 2?

THE WITNESS: The pipes were visible.

JUDGE ORINGER: Old pipes or new ones?

THE WITNESS: These were old, Sir.

JUDGE ORINGER: So in the second site, it was old fill, it had been worked -- this was earth that had been worked in previously; is that correct?

THE WITNESS: Yes, Sir.

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-23-74.  
Chester C. Whiteside for Department, By Judge Oringer.

156

THE WITNESS: Well, this pipe which is shown in this picture certainly was not put down by Olin. This is new.

MR. BALL: But it was only down about 2 or 3 feet.

THE WITNESS: That would be an estimate on my part.

JUDGE ORINGER: I have another question.

This gentleman that you saw coming out of the trench on the ninth, was he coming out on the ladder shown in this picture?

THE WITNESS: Yes, Sir.

JUDGE ORINGER: Approximate to where they had what seems to be, at least, an attempt at sheeting?

THE WITNESS: Yes, Sir.

JUDGE ORINGER: Or bracing?

THE WITNESS: Yes, Sir. In these pictures, nothing really had been removed or disturbed.

There was no reason to move anything. The employer did not attempt to move anything.

JUDGE ORINGER: Did anybody speak to that

\* \* \* \* \*

worker, the one that came out here? Do you recall?

THE WITNESS: I believe him to be the one that we made reference to in the file. We were remiss in not asking him what he was doing, but we did ask if he had been in the trench, and to us at that time it appeared that was all we needed to know.

JUDGE ORINGER: Are these the tools that he allegedly was using in that particular picture numbered C-5, where Mr. Pauly is standing?

THE WITNESS: Those were the two, Sir, that were observed in the trench and whether or not this laborer or this gentleman was using them, I have no idea at all, to tell you the truth.

JUDGE ORINGER: All right. I have no other questions.

Anything else of this witness, Gentlemen?

MR. GOTSCH: I have nothing further.

MR. BALL: There seems to be some confusion in my mind.

Excerpts of Minutes of Hearing, 1-24-74.

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

----- -x  
PETER J. BRENNAN, SECRETARY OF LABOR :  
UNITED STATES DEPARTMENT OF LABOR, :  
Complainant, :  
vs :  
OLIN CONSTRUCTION CO., INC., : Docket  
Respondent, : #4459  
UNITED STEELWORKERS OF AMERICA :  
LOCAL NO. 15480, :  
Authorized Employee :  
Representative :

----- -x  
PETER J. BRENNAN, SECRETARY OF LABOR :  
UNITED STATES DEPARTMENT OF LABOR, :  
Complainant :  
vs. :  
OLIN CONSTRUCTION CO., INC., : Docket  
Respondent : #4418  
UNITED STEELWORKERS OF AMERICA :  
LOCAL NO. 15480 :  
Authorized :  
Employee :  
Representative :  
----- -x

United States Courthouse & Post Office  
101 No. Clinton Street  
Syracuse, New York

January 24, 1974  
9:30 A.M.

BEFORE: JUDGE DAVID G. ORINGER

S. & S. REPORTING CO., INC.  
132 Nassau Street  
New York, New York  
Worth 2 - 2915  
2943

Excerpts of Minutes of Hearing, 1-24-74.

A P P E A R A N C E S :

168

FRANCIS V. LA RUFFA  
Regional Solicitor  
United States Department of Labor  
1515 Broadway  
New York, New York  
BY: THEODORE T. GOTSCH, ESQ. of Counsel

DONALD J. BALL, ESQ.  
Attorney for the Respondent  
436 South Salina Street  
Syracuse, New York 13202

P R E S E N T:

RICHARD MURPHY

TIMOTHY HOWARD DUERR

Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, Direct.

169

JUDGE ORINGER: Very well, gentlemen, let's proceed.

MR. BALL: I would like to call  
Richard Murphy.

Thereupon,

RICHARD MURPHY,  
was duly called as a witness for and in behalf of  
the Respondent, and being then and there duly  
sworn by Judge Oringer, assumed the witness stand  
and upon examination, testified as follows:

DIRECT EXAMINATION BY MR. BALL

BY MR. BALL:

Q Would you state your name and address for  
the purposes of the record?

A Richard A. Murphy, R.D. 1, Brewerton,  
New York.

Q And by whom are you employed?

A Olin Construction Company, Incorporated.

Q In what capacity, Mr. Murphy?

A Project superintendent.

Q And how long have you been so employed by  
Olin?

A 3 years.

Q Prior to that, would you give us your back-

\* \* \* \* \*

Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, Direct.

199

what happened?

A When I got there, Mr. Whiteside and Mr. Pauly were taking pictures of the hole or excavation.

Q Did you see him take Exhibits C-4, C-5 and C-6?

A Yes.

Q And did you have any discussions with either Mr. Pauly or Mr. Whiteside at that time?

A The only discussion that I had was--with the two of them was that the trench was not complete for piping that day.

We were in the process of installing bracing or shoring.

Q Did you see anyone in the trench that day?

A No, I did not.

Q Well--

A I--none of the Olin employees, no.

Q I am talking about Olin employees.

A No.

Q Did you see some other people in the trench?

A Yes, I did.

Q And who were they, Mr. Murphy?

A The OSHA representatives.

Q As shown on Exhibits C-5 and C-6; is that correct?

A Yes.

JUDGE ORINGER: Did you see both of them or one?

THE WITNESS: I seen both of them.

Q Did you observe the soil conditions at this excavation, Mr. Murphy?

A Yes, I did.

Q And would you describe these to the court?

A What the conditions were?

Q Yes, the soil conditions.

A I would say a stable, firm, sandy, gravelly soil, with a trace of clay in it.

Q Did you observe the bottom of the trench?

A Yes.

Q And did you observe the sides of the trench?

A Yes.

Q Could you tell the court whether--what the angle of repose was, if any, of the sides of the trench?

A This would be an estimation, but I would say close to a 45 degree angle.

JUDGE ORINGER: You mean one to one?

THE WITNESS: Approximately, yes.

Q What work was being conducted at this work site that you observed when you were there, Mr. Murphy?

A When I arrived, all work had stopped. I talked to the foreman and he said that they were in the process of installing the bottom brace on the shoring that is in the trench, plus getting ready to put the shoring on the other side of the gas line.

Q Was the trench--

MR. BALL: Withdrawn.

Q Would you tell the court what the condition was of the trench insofar as being prepared for actual installation of pipe?

A It was approximately deep enough. Outside of that, it was just a matter of protecting the banks, and there would have been ready to install the pipe.

Q In your opinion, as an experienced superintendent, would you have said that the--would you give an opinion as to the safety conditions of the trench as you observed them on August 9th, when you were there?

A It was safe for a person to be in the trench.

Q Yes?

A Yes, I would say it was safe.

Q And who was the foreman on that particular--

A Timothy Duerr.

Q Is he present here today?

A Yes.

Q Is he still employed by Olin?

A Yes.

Q Did you see anyone entering--any Olin employee entering any part of the trench when you were there?

A No, I did not.

Q Or coming out?

A No, I did not.

MR. BALL: I have nothing further.

JUDGE ORINGER: All right, let's have a two minute recess.

(A two minute recess was taken.)

JUDGE ORINGER: You may proceed, Mr. Gotsch.

CROSS EXAMINATION BY MR. GOTTSCH

BY MR. GOTSCH:

Q Mr. Murphy, who employed Olin Construction Company to perform this project on Lakeshore Road?

A I did not catch the first part of that question.

Q Who employed Olin Construction to do this main line and lateral pipe line job on Lakeshore Road?

A It was a bid project, put out by the County of Onondaga.

Q And did the County engineer give you plans for this job?

A No, they have a consulting engineering firm.

Q What was the name of that firm?

A Barton, Brown, Clyde & Loguidice.

Q And did they give you the specifications for the trenches that you were to dig on this job?

A I do not follow your question.

Q Well, did they give you job specs for the job that you had to do, which was put in a main line sewer line, and all of these later-

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Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, Cross.

208

A No, they did not.

Q They made no soil surveys?

A Not in certain--in certain spots they took test borings, but not--

Q Did they take any near this particular location?

A I would have to look at the soil booklet to find out. I do not know.

Q Generally speaking, what did their soil borings show as the types of soil that you would be working in?

A It depended on the location of the job. Some areas it showed rock, other areas it showed loose running material, and other areas yet, it showed a stable material.

Q Were these all at locations close to the lake or were some of these areas some distance from the lake?

A Well, most of it is close to the lake, because that is where the job went, primarily, right along the lake.

Q Generally speaking though, there was various types of soil that you were working in near the lake; is that correct?

A Yes.

Q Now, on August 31, in the digging of this trench, were there any underground constructions that you had to be careful of when you were digging that lateral?

Were there any electrical lines or gas lines running through?

A I don't think there was in the particular case. There is a gas line that runs along the edge of the road, but I don't think we exposed it.

Q What procedure would you have to take to expose the gas line?

Would you dig down with your backhoe until it was exposed?

A No, you would dig down part of the way, and then you would probe for it by hand.

Q So when you are looking for an underground obstruction, you would dig by hand; is that correct?

A That is right.

Q And do you know what the depth of this gas line was on--at the 6710 Lakeshore address?

A I did not say it was a gas line there.

Q I thought you--

MR. BALL: I did not get the answer.

THE WITNESS: I did not say there was a gas line there.

Q You said that near the road there was a gas line.

A I said near the edge there was a gas line, but I don't think we exposed the gas line.

Q You may not have exposed it, but were you looking for it? Were you watching out for it?

A Definitely, we were watching out for it, yes.

Q And would you have sent your backhoe into the area where this gas line might be found?

A To take the top portion off, yes.

JUDGE ORINGER: How would you get the rest of the soil off?

THE WITNESS: Once you located it, the backhoe would do all of the work, but you would have to probe for it by hand.

Excerpts of Minutes of Hearing, 1-24-74.

Richard Murphy for Respondent, Cross.

21.

Q This gas line is the only line that you can recall in the line of this lateral trench?

A Yes.

MR. BALL: I object to that. He did not say it was in line with the lateral trench.

JUDGE ORINGER: He said yes.

Do you want to explain that answer?

THE WITNESS: Well, what I am trying to say is, the proper site is where the gas line was. We never went underneath the gas line.

JUDGE ORINGER: Go ahead.

Q Would the gas line be approximately in the area where Mr. Whiteside is kneeling?

A No.

Q Where would that be?

A It would be on the north end of the trench.

Q Near the house?

A Yes.

Q And--all right.

Excerpts of Minutes of Hearing, 1-24-74.

212

Richard Murphy for Respondent, Cross.

And do you recall the depth of this gas line?

A They are approximately  $2\frac{1}{2}$  to  $3\frac{1}{2}$  foot deep.

Q But you did not find it on this date? You did not expose that?

A No, we did not.

Q Were you looking for it? Did you--would it have been necessary to probe for that gas line while you were digging the lateral up towards the house?

A Well, this lateral was dug from the house back toward the road, because at this particular point this road and everything is approximately 25 to 30 feet above the lake, and then it drops right off to the lake, so you could not dig it from the road out.

Q Well, how did you satisfy yourself that you would not run into the gas line?

Wouldn't it have been necessary to expose that gas line so that you could lay your lateral pipe?

A No.

Excerpts of Minutes of Hearing, 1-24-74.

Richard Murphy for Respondent, Cross.

213

Q But it is possible you had a man in the trench probing for that gas line on that Jay?

MR. BALL: I object to that as being--

JUDGE ORINGER: Well, it is cross examination.

Did you have somebody in the trench? Do you know?

Was there somebody in the trench probing for it?

THE WITNESS: I don't know because, as I say, I came onto the job--

JUDGE ORINGER: You don't know. You could not give an answer one way or another; is that right?

THE WITNESS: I could not.

JUDGE ORINGER: Go ahead.

Q What action did you take after Mr. Whiteside and Mr. Pauly apprised you of their findings on August 3rd?

What did you--did you take any action to abate this alleged violation? What action did you take at that point?

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Excerpts of Minutes of Hearing, 1-24-74.

Richard Murphy for Respondent, Cross. 217

picture, can you give us an estimate of what the angle of repose is, if there be one?

THE WITNESS: On which side of the trench, north, south, east or west?

JUDGE ORINGER: Tell him what side of the trench you are talking about.

Q Mr. Whiteside is on the north side of the trench; is that correct?

A No.

Q Which side of the trench is he on?

A Not completely.

Q Which side is he on?

A He would be on the southwest side.

Q All right. Looking over to the northeast side of the trench, what would you estimate the angle of repose to be there?

JUDGE ORINGER: If any.

A It is hard to tell. According to the picture, it does not look like that much repose.

JUDGE ORINGER: It looks straight down, if you could trust the picture.

MR. BALL: Well--

JUDGE ORINGER: I am saying--if  
you can trust the picture, that is  
what it looks like.

Q Mr. Murphy, looking at Exhibit C-3, we have  
a shot of a backhoe bucket in the bottom  
of the trench and the embankment directly  
in front of the backhoe.

What would you--what would you describe  
the angle of repose to be in that picture?

MR. BALL: C-3, did you say?

MR. GOTSCH: C-3.

A Now, here is a question I want to ask.

From what point? From the height of  
the original ground or the height of the  
spoil?

Q Well, as far as that goes, if you have soil  
built up there, I think you have to include  
that.

MR. BALL: I will object to this  
procedure, your honor.

JUDGE ORINGER: It is cross exam-  
ination. I mean, let's hear his an-  
swer.

If it were direct, I would not allow

Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, Cross.

219

it, but it is cross.

A I would say probably, right there at that point would be 60 degrees.

Q All right. That is your estimation.

JUDGE ORINGER: Assuming there were no spoils and you looked at it from the level of the ground, what would the angle of repose be, if there be any angle of repose.

THE WITNESS: Yes, there would be an angle of repose. I would say 55 to 60. I mean, it would be hard to say.

JUDGE ORINGER: Go from the picture.

Let the record reflect that it took the witness a good minute on reflection to give us an answer. Go ahead.

Q Mr. Murphy, you stated you had approximately 13 years of supervisory experience in the pipeline business.

Have you had any education in the field of civil engineering?

A No.

Q All right. How about geology?

A No.

Q Have you taken any courses with respect to your work?

A No.

Q What was the depth of the trench on August 3rd? For example, where Mr. Whiteside is, to your estimation, did you observe the depth of the trench that day?

A I did not measure it. I would have to guess at it.

Q Well, what would your estimation be?

A Approximately 6 foot.

Q Approximately 6 foot?

A Yes.

Q Is that at the end where Mr. Whiteside is kneeling?

A Yes.

JUDGE ORINGER: That is on August 3rd?

MR. GOTSCH: August 3rd.

THE WITNESS: Right.

Q How about the other ends, up closer toward the house? What was the depth of that?

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Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, Cross.

222

Q Who was the superintendent on that piece of the work?

A Ron LaFleur.

Q And were you present when Mr. Whiteside and Mr. Pauly began their inspection?

A Not when they arrived on the job, no.

Q Not when they arrived at the job?

A Right.

Q They had been there a while before you arrived on the scene; is that correct?

A Yes, I would say 5 minutes.

Q All right. Looking at Exhibit C-5, did you observe the tools and other implements in the trench on August 9th?

(Handing.)

A Yes, I did.

Q Where Mr. Pauly is standing?

A Yes, I did.

Q Were those tools used by Olin employees?

A Yes.

Q Looking at Exhibit C-5, what would you characterize the angle of repose to be at--both in front and behind Mr. Pauly?

A Approximately 45 degrees.

Q And what type of soil would you characterize that as?

A A firm, stable soil.

Q Do you know what types of soil compose the soil that this excavation was dug in?

A Sandy clay.

Q And did a foreman--did the foreman, Timothy Duerr, or the superintendent, Ron LaFleur, indicate to you that they had men working in the trench?

A Timothy Duerr did, yes.

Q And that was in the area where the tools and other implements are shown?

A No, it was not.

Q In Exhibit C-5?

A No, it was not.

Q How did those tools get into that position?

A I do not know. I was not there.

Q In this exhibit, R-1, you--in explanation you said--I believe you said that Joseph Loop was on the cleanup crew?

A Yes.

Q How much time did he spend on the cleanup crew that day?

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Excerpts of Minutes of Hearing, 1-24-74.

Richard Murphy for Respondent, Redirect. 230

bottom, and 18 to 20 feet at the top--

JUDGE CRINGER: You meant 4 foot  
wide.

Q Four feet wide at the bottom, I am sorry,  
and approximately 18 to 20 feet wide at the  
top; is that your estimate?

A Yes.

Q And with those dimensions in mind, Mr.  
Murphy, do you have an estimate as to the  
angle of repose that existed at that par-  
ticular point?

A Well--

Q Do you have an estimate of the angle of re-  
pose with those dimensions in mind at the  
point where the measurement is being taken  
by Mr. Whiteside as depicted in Exhibit C-1?  
Do you have an opinion?

A Yes.

Q And what is this opinion?

A I would say approximately 45 degrees.

Q And referring to Exhibit C-5 which refers  
to the job site inspection on August 9th,  
do you have an opinion as to the width of  
the excavation at the bottom level?

A This would be just a rough guess.

MR. BALL: Thank you, I have no further questions.

RECROSS EXAMINATION BY MR. GOTSCH

BY MR. GOTSCH:

Q Mr. Murphy, Exhibit C-3, does this show a view of the excavation on August 3rd?

A Yes.

Q And can you tell from that photograph what the width of the excavation is at the bottom?

A Not exactly, not from the photograph, no.

Q How about the width at the top from one side of the embankment to the other?

A You cannot, because you cannot see the other side over here.

Q But you characterized the angle of repose in this scene as 60 degrees, earlier, did you not?

A From the picture, yes.

Q What is the size of the bucket in--on one of these backhoes?

A You mean--

Q Well, looking at Exhibit C-1, about how long

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Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, By Judge Oringer.

238

or in length or--

JUDGE ORINGER: When we were just talking about this, you said one of the trenches was pear shaped, and which one is that?

THE WITNESS: August 3rd.

JUDGE ORINGER: All right. Now, the pear shaped trench, you say the big end of it was old fill, am I right, that is where there had been previously dug earth.

THE WITNESS: Yes.

JUDGE ORINGER: What materials were the old fill made of, loam, sand, rock, shale, pebbles, what?

THE WITNESS: The top 3 feet of it was gravel that was put in--back into the trench when we put the main line through, and the rest was a sandy, gravelly material with some clay in it.

JUDGE ORINGER: This is under the 3 feet?

THE WITNESS: Yes.

JUDGE ORINGER: You say it was

sand and gravel with some clay.

Now, you would consider virgin soil more stable than old fill, would you not?

THE WITNESS: Definitely.

JUDGE ORINGER: So that the larger part of this trench was less stable than the smaller part with the virgin soil; is that correct?

Is that a fair statement?

THE WITNESS: If I understand your question, right, the bigger area of the trench would be unstable, yes.

JUDGE ORINGER: Was less stable than the other, right.

Now, would you--do you consider clay somewhat trecherous?

MR. BALL: Trecherous?

JUDGE ORINGER: Yes.

THE WITNESS: Clay itself, yes.

JUDGE ORINGER: How much of it-- of that portion of the--where the old fill was, you said there was some clay.

What percentage do you think was clay?

THE WITNESS: Very little. I was not there to estimate. It was mostly sand and gravel.

JUDGE ORINGER: All right. You would not consider sand as very stable, would you?

THE WITNESS: No, I would not.

JUDGE ORINGER: Do you usually carry that ruler with you, the ruler that Mr. Whiteside had to borrow because the Secretary did not bring his own?

THE WITNESS: Yes.

JUDGE ORINGER: Do you have it with you now?

THE WITNESS: No, I mean when I am on the job.

JUDGE ORINGER: Now, if I understand correctly, your estimate of the August 3rd trench was 6 feet deep, am I correct?

THE WITNESS: Yes, I would say 6 to 7 feet.

JUDGE ORINGER: 6 foot deep to 7 foot deep.

It was 4 foot wide at the bottom  
and 18 to 20 feet wide at the top?

THE WITNESS: Yes. Now, this is  
all in the--this is where it had been  
dug once.

JUDGE ORINGER: At the pear shape?

THE WITNESS: Right.

JUDGE ORINGER: And how long was  
it?

THE WITNESS: Approximately 20  
feet.

JUDGE ORINGER: Now, the second  
trench, the August 9th trench, what would  
your approximation be of the length of  
it?

THE WITNESS: 15 feet, I would say.

JUDGE ORINGER: How wide was it,  
approximately?

THE WITNESS: Again, this is a  
pear shaped trench.

JUDGE ORINGER: Yes.

THE WITNESS: I would say out on  
the road, I would say it was probably  
10 to 12 feet.

Excerpts of Minutes of Hearing, 1-24-74.  
Richard Murphy for Respondent, By Judge Oringer.

242

JUDGE ORINGER: And how much at the bottom, if you recall, in that area?

THE WITNESS: Again, 3 to 4 feet.

JUDGE ORINGER: And what was the depth of that one, if you recall, approximately?

THE WITNESS: I would have to guess again. Maybe 6 to 8 feet, I would say. I did not do any measuring on this one at all.

JUDGE ORINGER: Did you measure the first one?

THE WITNESS: Just the width at the road.

JUDGE ORINGER: Did anybody measure the width at the bottom on that, that first one?

THE WITNESS: Not that I know of.

JUDGE ORINGER: All right. Now, On August 3rd, were there any policemen working as flagmen on that job at Lakeshore Drive?

THE WITNESS: At Lakeshore project

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JUDGE ORINGER: The company, I mean.

THE WITNESS: No.

JUDGE ORINGER: Now, your job is of such a nature, is it not, that you would spend your entire day, let's say at the Lakeshore trench, am I correct?

THE WITNESS: No, I would not.

JUDGE ORINGER: Or at the other trench on August 9th? You would not be standing there all day, either, would you?

THE WITNESS: No, I would not.

JUDGE ORINGER: About what percentage of the time that you work would you spend at either trench on either date?

THE WITNESS: That is a hard question to answer because if the crew is having problems I might spend an hour or two out there. If they are not, then I might spend 10 minutes and 15 minutes.

JUDGE ORINGER: You might not even show up, in other words?

Had you not received a call that

the compliance officers were there,  
you may not have gone to the trench;  
is that correct, at that time?

THE WITNESS: It is very possible,  
because I was on the other end of the  
job.

JUDGE ORINGER: What does this  
mean, filled potholes over trench line  
along Lakeshore Road?

THE WITNESS: Well, where we had  
previously put the pipe, we had to put  
gravel back in, and after it sets for  
at least a 3 month period, and settles  
down, we have to restore the original  
pavement, but this is the gravel.

JUDGE ORINGER: Incidentally, let  
the record reflect that I am reading  
from Respondent's Exhibit Number 1.

Now, would filling these potholes  
take anyone into the trench?

THE WITNESS: No, this is on the  
road surface.

JUDGE ORINGER: Now, then it  
says, "Spread calcium over Lakeshore

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Drive a truck?

THE WITNESS: Yes.

JUDGE ORINGER: What else?

THE WITNESS: Anything.

JUDGE ORINGER: Would he go into a trench on any occasion, if you had some shoveling to do to locate a pipe?

THE WITNESS: Yes.

JUDGE ORINGER: How about the foreman? Does he supervise or does he work with the men?

Would he, on occasions, go into a trench to locate a pipe or anything like that?

THE WITNESS: Yes, sometimes.

It would be if there was a problem of some sort.

JUDGE ORINGER: Otherwise, he would send in one of his subordinates.

THE WITNESS: Right.

JUDGE ORINGER: He was in charge of the other 4 men on that job, that day.

THE WITNESS: On the cleanup, yes.

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Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.

255

tools down or assist him in laying the pipe.

JUDGE ORINGER: All right, I have nothing else. You are excused.

Call your next witness.

MR. BALL: I call Mr. Duerr.

JUDGE ORINGER: Would you please mark Exhibit R-2 for identification into evidence.

(A work sheet -- received and marked in evidence, instead and in place of identification, as Exhibit R-2, as of this date.)

Thereupon,

TIMOTHY HOWARD DUERR,  
was duly called as a witness for and in behalf of the Respondent, and being then and there duly sworn by Judge Oringer, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION BY MR. BALL

BY MR. BALL:

Q What is your name?

A Timothy Howard Duerr.

Q Where do you reside, Mr. Duerr?

A B48 Sand Ridge Court, Pennelville, New York.

Q And by whom are you employed?

A Pardon me, sir?

Q By whom are you employed?

A Olin Construction.

Q How long have you been so employed?

A 8 months.

Q I am sorry.

A 8 months.

Q And where were you employed--by whom were you employed prior to the 8 months?

A Congrunder Construction Company.

Q And how long were you employed by that company?

A 4½ years.

Q And were you employed prior to that time in the pipeline business?

A Yes, I was.

Q And by whom were you employed?

A Ontario Construction Company.

Q And for how long a period of time was that?

A Two years.

Q On August 9, 1973, were you employed by

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.

257

Olin Construction Company?

A Yes, I was.

Q And in what capacity?

A Foreman.

Q Just general foreman or did you have a specific--

A Lateral foreman.

Q And had you worked in this capacity prior to that time either for Olin or any of the other previous employers?

A Yes.

Q And how long had you been acting as lateral foreman prior to that time?

A Roughly 6 months.

Q Did you have any particular training and experience in underground work with any firm such as Olin or any previous employers?

A I was involved in a training program for Congrunder, and it was on the job training for foremen.

Q And that was sponsored by Congrunder?

A That is correct.

Q It was after that training period that you came to work for Olin; is that correct?

A That is correct.

Q And on August 9th, I recall you said you were employed by Olin as a foreman of the lateral crew?

A That is correct.

Q Now, did there come a time on August 9th when you were working as foreman of the lateral crew?

A Yes.

Q And where was this--where was the job site at which you were working?

A It was Lakeshore Road, a half mile to three quarters of a mile east of the field office.

The house number I cannot remember.

Q Do you recall on that date whether there came a time when members of OSHA arrived, or inspectors from OSHA arrived to make an inspection of the work site at which you were operating at that time?

A Yes.

Q And do you know the name of the OSHA representatives that came to your work site?

A Mr. Whiteside and Mr. Pauly.

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.

259

Q Do you recall the time?

A I believe it was in the morning, some-  
time in the morning.

Q Sometime in the morning?

A Yes.

Q Would you describe to the court what work  
was going on at the time that the OSHA  
representatives arrived, describe what was  
going on at that particular time, at that  
particular job site?

A I was in the process of installing  
bracing and sheeting in the open trench.

Q I show you Exhibit--

JUDGE CRINGER: That was on  
August 3rd.

MR. BALL: August 9th.

Q Just to clarify the record, did you have  
any--did you participate in any way with  
what took place on August 3rd, the inspec-  
tion on August 3rd?

A No, sir.

JUDGE CRINGER: I am sorry.

Q And your only testimony goes to the inci-  
dent that took place on August 9th; is that

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.  
correct?

260

A That is correct.

Q I show you Exhibit C-4, and ask you if that represents what was--is a representation of what was taking place at the job site on August 9th on Lakeshore Road?

A Yes.

Q From Exhibit C-4, can you describe to the court what was taking place at that particular point?

A It was in the process of putting in the bottom brace to the shoring.

Q Would you describe to the court what happened when you saw the representatives of OSHA coming to the job site, you or other employees who were there?

A Well, work stopped as it always does.

The man was just coming on the ladder previous to installing the bottom brace.

Q I refer you to Exhibit C-4.

Is that bottom brace shown upon that exhibit?

A It is not showing in the hole. It is showing just behind the ladder.

Q It is on the ground level, just behind the ladder; is that where it is?

A Yes, sir.

Q And that was to be installed at the bottom of the shoring?

A That is correct.

Q And why didn't he install it at that particular time?

A Because I told him to come out of the hole.

Q I am sorry.

A I told him to come out of the hole.

Q Because you saw the OSHA people coming?

A That is correct.

Q Now, the lateral as shown in Exhibit C-4 is on what side of the trench, direction-wise?

A What was the question again?

Q What side of the trench, direction-wise is the ladder?

A That was on the north side.

Q So that the trench extended from south to north?

A That is correct.

Q And where was the roadway in relation to the

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.

262

picture?

A At the south end of the trench.

Q In Exhibit C-4?

A The south end of the trench, yes.

Q I show you Exhibit C-5 and Exhibit C-6, depicting Mr. Pauly in the trench.

Now, what portions of the trench is that where Mr. Pauly is shown standing?

A It is the portion next to the road or the south side of the trench.

Q So that would be the southerly part of the trench?

A That is correct.

Q And were there Olin employees in this portion of the trench?

A No, sir.

Q And had there been, prior to the time that Exhibits C-5 and C-6 were taken?

A No, sir.

Q Was there--was the trench, as shown in Exhibits C-4 and C-5 and C-6, complete and ready for completion of the installation of the lateral line?

A No, sir.

Q Further work had to be done before the so-called lateral crew or your crew would complete the installation of the lateral pipe?

A Yes, sir.

Q And what else would have to be done, Mr. Duerr?

A Shoring installed.

Q That includes both sides, where it is shored and unshored; is that correct?

A That is right.

JUDGE ORINGER: In other words, you were in the act of putting in your shoring, bracing and sheeting at the very time that they arrived?

THE WITNESS: Yes.

Q Now, in your experience as a foreman of this type of work, Mr. Duerr, I show you Exhibit C-5 and Exhibit C-6, which is the unshored portion of the trench, and would you consider that still an unsafe trench at that particular point in the condition that it was in, that of being unshored?

A No.

Q Do you have any--did you make any measure-

ments of the depth of the trench on the southerly side of the trench?

A No, I did not.

Q Did you have an estimate as to the depth at that point?

A Yes.

Q Approximately how deep was that, Mr. Duerr?

A Average, 9 foot.

Q Do you have any instructions as to the method of handling a 9 foot trench as depicted on 5 and 6, C-5 and C-6, as to making it a completely safe trench?

Do you have any instructions from your superintendent or from the owner of the business?

A From past experience, yes.

I have to have it sloped at a 45 degree angle.

Q Or any other instructions?

A And bracing.

Q And is that what you were in the process of doing at that particular time?

A Yes.

Q I think there has been some mention, Mr. Duerr,

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Direct.

265

of the fact that there is a shovel or a bar or some other item shown in Exhibits C-5 and 6 in this so-called unshored portion of the trench.

Do you have any explanation of their being in there?

A Yes, they were thrown in there for future use to install the lateral.

Q How near were you to the--to actually laying pipes at this particular moment in time, when these pictures, C-4, C-5 and C-6 were taken?

A Nowheres near it. We still had the shoring to put in the hole.

Q How long would you estimate that would have taken before--that was the only thing else that you had to do before the lateral was put in?

A Yes, 20 minutes to a half hour.

Q You were preparing everything to get ready to install the pipe?

A Yes.

Q And installing the shoring was the last thing you had to do, and then you would be

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

256

ready to go ahead?

A Yes.

MR. BALL: I believe that is all  
I have.

CROSS EXAMINATION BY MR. GOTSCH  
BY MR. GOTSCH:

Q Mr. Duerr, you were present on August 9th--

JUDGE ORINGER: Mr. Gotsch, if  
you have something to show the witness  
do it, but I would prefer if you do  
not stand on top of the witness.

Q Mr. Duerr, do you know the definition of  
the term, the angle of repose?

A No, not according to the book.

Q Well, what would you characterize that term  
to mean in your own mind?

A To me, a good angle of repose would  
be a 45 degree slope.

Q Now, you note the position in which Mr.  
Pauly is standing there, in this photograph.  
What angle of slope--

MR. BALL: I am sorry. What photo-  
graph are you talking about?

MR. GOTSCH: C-5.

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross. 267

JUDGE ORINGER: Ask him if he  
knows first.

Q If you know, how would you characterize--

JUDGE ORINGER: Do you know whether  
there is an angle of repose here?

If you do, can you estimate it?

THE WITNESS: I would say yes,  
there is an angle of repose, and I  
would estimate it to be at least 45  
degrees.

Q All right. Now, Mr. Duerr, I see in Exhibit  
C-4, you have some sort of bracing arrange-  
ment set up there.

Who was in charge of installing the  
bracing?

A I was.

Q You were in charge.

And what specifications did you follow  
in installing that bracing?

A 3/4 inch piece of plywood with trench  
jacks and 2 inch pipe.

Q Did you consult with a professional engineer  
in arriving at this?

A No.

Q What other--I mean--

JUDGE ORINGER: Is there a standard that states what the requirements are?

MR. GOTSCH: Yes, there is, if you look at 652(g) and the table P-1, it has the minimum requirements for trench shoring, and I was just wondering.

Q Mr. Duerr, did you consult with the standards and these requirements when you started to put in this shoring that you show us here?

JUDGE ORINGER: Are we talking about Table--this Table 2 that we are talking about?

MR. GOTSCH: P-2. It has a quite detailed list of requirements needed for shoring.

JUDGE ORINGER: Were you using trench jacks?

THE WITNESS: Yes, sir.

JUDGE ORINGER: Well, no one says trench jacks may be used instead of or in combination with coarse bracing.

Were you using coarse bracing?

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

269

MR. BALL: It says in lieu of.

JUDGE ORINGER: It says in lieu  
of or in combination with.

Go ahead, I am sorry.

Q What type of sheeting is that in use? What  
is the material that is shown in that photo-  
graph?

A It is 3/4 inch exterior plywood.

Q And, Mr. Duerr, how long had the balance of  
that trench been excavated? What period of  
time--

A An hour, an hour and a half.

Q And when did you--how long did it take you  
to put in that form of bracing?

A I would have to estimate, 10 to 15  
minutes.

As it sits now, it is not complete.

Q It is not complete. Where were your employ-  
ees working in the placing of that bracing?

A There was one on the top that lowered  
the piece of plywood in, and went on the  
other side and lowered that in, and went  
down the ladder halfway, and with 2 ropes  
positioned the first brace, secured it.

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

270

He was in the process of lowering the second brace into the hole and lowering that, when--

Q Was any consideration given to the formula shown in the OSHA regulations at 29 C.F.R. 1926.652(g)(2), where it notes, "braces and diagonal shores and a wood shoring system shall not be subjected to compressive stress and excessive values given the following formula?"

Did anyone compute the stress that could be expected in this excavation?

JUDGE ORINGER: Do you know what he is talking about? Do you understand the question?

THE WITNESS: I don't even understand what he is saying.

Q All right. You were in charge of putting the bracing in and the shoring?

A That is correct.

Q Had anyone taken--evaluated the soil conditions here and determined exactly what the stress that could be encountered here was?

JUDGE ORINGER: Do you know if

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

271

anyone did it?

THE WITNESS: Not that I know of.

JUDGE ORINGER: All right, go on.

Q Do you ever use a portable trench shield in your operation?

A Yes, sir.

Q What material is that made out of? Describe a portable trench shield, if you will.

A Well, it is 4 pieces of 3/4 inch plywood, braced with 2 by 6 hard wood, and pre-manufactured trench jacks.

Q And on the date of this inspection, were you waiting for this piece of equipment to arrive at your job site?

A No, sir.

Q You did not intend to use that?

A No.

Q The portable trench shield?

A No.

Q All right. Were you aware of the regulations that specified that bracing or shoring of trenches shall be carried along with the excavation?

A Yes.

Q You were aware of that?

A That--rephrase that question?

Q Were you aware of the regulation that states that bracing or shoring of trenches shall be carried along with the excavation?

A You mean from one hole to the other, carried along with the operation?

Q Well, with the excavation as it is in progress?

A Yes.

Q If you know, what does that regulation require you to do?

A Well, you are asking--after you have finished excavating, then you shore, in my opinion.

JUDGE ORINGER: There is an allegation that the employer failed to shore the excavation by providing shoring, bracing or other support to protect employees who were working and exposed in the bottom of the excavation.

The burden of proof is upon the Secretary, but go ahead.

I don't know how this helps. I

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

273

am not interrupting you, if you think it helps you.

If you expect every construction foreman to be able to interpret this regulation, I mean, I think they-- if they do it wrong, and you find that it is inadequate, then they are in violation. But to make him an interpreter, go ahead.

MR. GOTSCH: Your honor, if I could have a two minute recess, I would like to consult with my clients.

JUDGE CRINGER: All right.

(A short recess was taken.)

Q Mr. Duerr, what were your men doing when the compliance officers arrived on August 9th, the 2 men that were in the trench?

MR. BALL: I am sorry, I could not hear that.

I could not quite hear that.

JUDGE CRINGER: What were the 2 men doing when the compliance--what were your men doing when the compliance officers arrived on August 9th?

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross.

274

Is that the question?

MR. GOTSCH: Yes.

A One man was on the ladder, proceeding to put the bottom brace in the shoring.

Q All right. Mr. Duerr, if you could just describe what the 2 employees in the trench were doing on August 9th before Mr. White-side and Mr. Pauly arrived--

JUDGE ORINGER: I did not hear there were 2 employees in the trench.

Did you say that?

THE WITNESS: No, sir.

JUDGE ORINGER: I did not hear that.

MR. GOTSCH: Well, certainly previous testimony had indicated there were 2 employees.

Q How many employees were in the trench when the inspection began?

A Actually there was one on the ladder going down to put the bottom brace on.

Q And how many had been in the trench that morning?

A None.

Excerpts of Minutes of Hearing, 1-24-74.

Timothy Howard Duerr for Respondent, Cross.

275

Q Did you not tell Mr. Whiteside and Mr.

Pauly that 2 employees had been in the trench that morning?

A Putting the top brace in, yes.

One was halfway on the ladder, holding it, while the other person lowered it down with the ropes with the top brace.

Q Were employees Christian and Spaingler working that day?

A Correct.

Q And were those two employees in the trench that morning?

A No, sir.

Q On August 9, 1973, you stated to Mr. Whiteside and Mr. Pauly that those 2 employees--

JUDGE DRINGER: Ask him if he stated it?

Q Did you state that?

A No, I did not, sir.

They asked me who were my workers or who were the men that worked in the hole.

Q And you gave them those 2 names?

A Correct.

Q And their addresses?

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Cross. 276

A I did not give them their addresses. I  
did not give them their addresses.

The men did that.

JUDGE ORINGER: I can not hear  
you.

THE WITNESS: I gave them their  
names. The employees gave them their  
address.

Q So on August 9, 1973, you did not tell Mr.  
Whiteside and Mr. Pauly that 2 employees  
were working in the trench?

A No.

Q Which gentleman was on the ladder at the  
time Mr. Whiteside and Mr. Pauly arrived?

A I cannot remember.

JUDGE ORINGER: He said he cannot  
remember.

Q In Exhibit C-5, there is some equipment at  
the bottom of the trench near Mr. Pauly.

What type of equipment is that?

A It looks to me like a rag and a piece  
of wood, and some sort of circular object.

Q What would this equipment be used for?

A Bracing and installing the lateral pipe.

Excerpts of Minutes of Hearing, 1-24-74.

Timothy Howard Duerr for Respondent, Cross.

277

Q And is there pipe--is there a connection shown near Mr. Pauly's foot on the pipe in Exhibit C-5?

A It looks like it.

Q That circular object?

A I could not guarantee it.

Q And would it have been necessary for employees to dig that pipe out?

A No.

Q In order to make the connection, it would not have been necessary?

A No.

Q How was that pipe exposed?

A By the backhoe.

Q And no part of this pipe was exposed by hand digging?

A No, sir.

Q Did you have your other shoring equipment available to place--

A Yes.

Q --to place the pipe in this trench?

A Yes.

Q And how many cross braces do you use in this type of shoring?

Excerpts of Minutes of Hearing, 1-24-74.  
Timothy Howard Duerr for Respondent, Redirect.

278

A Two.

Q Where is the second cross brace on this particular shoring?

A It is sitting behind the ladder in the process of being lowered into the hole.

Q Can you point it out in Exhibit C-4?

A Yes, I can.

Q Where is it in Exhibit C-4?

A It is that piece of pipe right behind that--

JUDGE ORINGER: Where are you pointing?

THE WITNESS: Five rungs down on the ladder, just behind it.

That is the bottom bracing that was to be installed at the bottom of the trench.

JUDGE ORINGER: Anything else?

MR. GOTSCH: I have no further questions.

MR. BALL: Just a few short questions, your honor.

REDIRECT EXAMINATION BY MR. BALL

BY MR. BALL:

Q Mr. Duerr, I show you exhibit C-5, and I ask if the shoring for the other portion of the trench appears in that picture?

A Yes, it does.

Q And can you describe where it appears?

A If you will look on the top right hand-- if you look at the top right hand side, you will see two human feet.

He is standing on the plywood, and directly in front of his toes are the cross braces.

MR. BALL: That is all, your honor.

JUDGE ORINGER: Anything else?

MR. GOTSCH: No, your honor.

JUDGE ORINGER: You are excused, sir.

Mr. Ball?

MR. BALL: I have nothing further at this point, your honor.

JUDGE ORINGER: Do you rest?

MR. BALL: I rest.

JUDGE ORINGER: All right, gentlemen.

\* \* \* \* \*

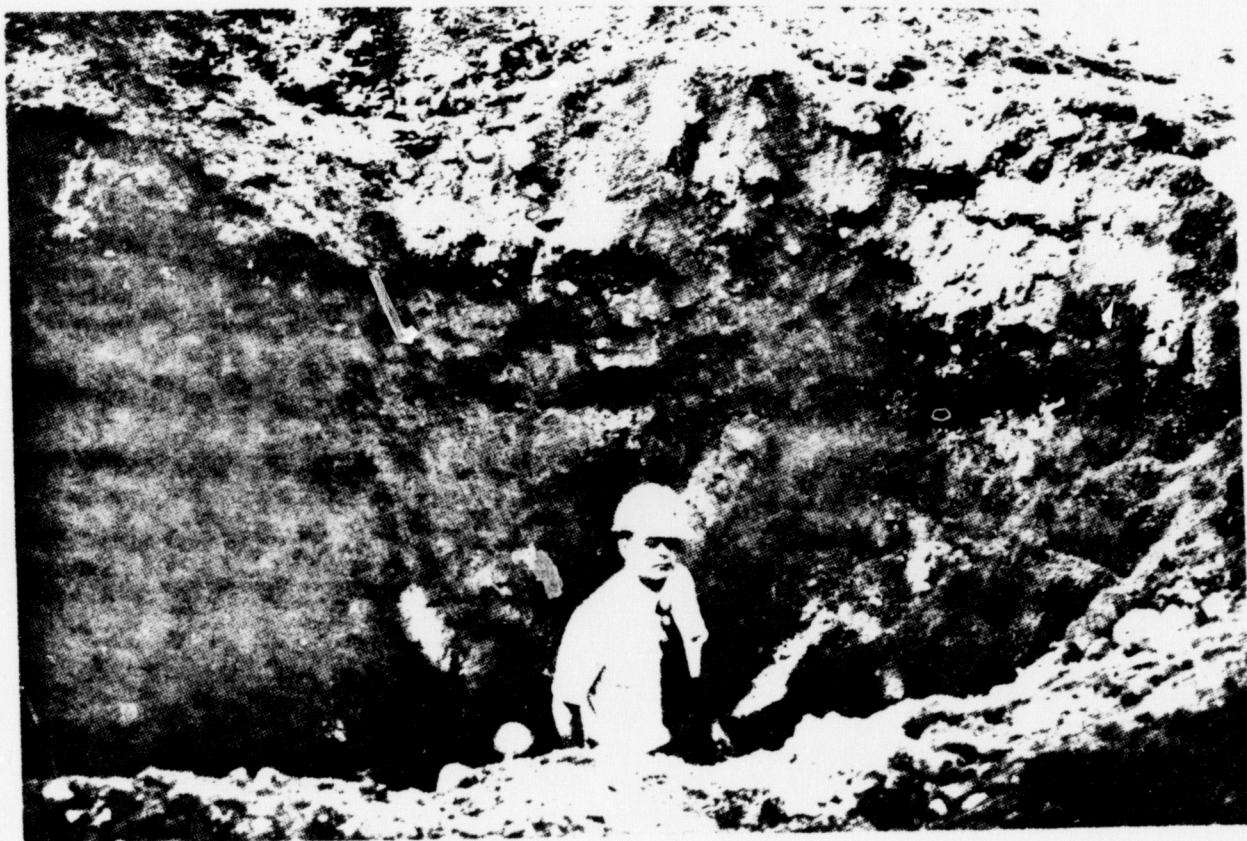
157

EXHIBIT C-4 — Photograph.



EXHIBIT C-5 — Photograph.





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HEALTH REVIEW COMMISSION and PETER J. BRENNAN, SECRETARY OF LABOR

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